

RDX 22

From: Kristy Ross
Sent: Tuesday, August 09, 2005 11:47 AM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

Thanks it seems like-they lost the code or something on them.. I'm trying to contact the company to fix them. I'm not sure what happened.

Appreciate the heads up!

Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 2:46 PM
Subject: Account Update

Kristy,

I have suspended 89573, 90012, 90448 until I hear back from you on the resolve on the sudden change on Winfixer's end with delivery of their ad.

Thank you for helping me with this, I really appreciate it!

Geoff Gieron

Director, Advertiser Management Services

myGeek.com

AdOn Network

602-265-5242

602-297-4219 (fax)

geoff@mygeek.com

IDSEAM:42f8f9fa22724702310458!

MGC00199
ROSS000023

EX KR 66 p1

From: Kristy Ross
Sent: Tuesday, August 09, 2005 11:49 AM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

Im not sure if you have any indication as to when this may have happened? I'm trying to offer them information to look at when it may have occurred. Do you think it was just today or earlier?

Thanks,
Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 2:46 PM
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!DSPAM:42f8f9fa22724702310458!

MCC00200
ROSS000024

p2

From: Kristy Ross
Sent: Tuesday, August 09, 2005 12:13 PM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

Thanks... theyre always updating their software it seems they overwrote everything.. trying to get them to roll the version back. Appreciate the help.

- Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 3:05 PM
Subject: RE: Account Update

Looks like it started today - I looked at the ad yesterday showing it off as an example of how to correctly submit an ad with a download on the second page.

Geoff Gieron

myGeek.com

From: Kristy Ross [mailto:kristy@globedat.com]
Sent: Tuesday, August 09, 2005 11:50 AM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

I'm not sure if you have any indication as to when this may have happened? I'm trying to offer them information to look at when it may have occurred. Do you think it was just today or earlier?

Thanks,

Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 2:46 PM
Subject: Account Update

ROSS000025

p3

Kristy,

I have suspended 89573, 90012, 90448 until I hear back from you on the resolve on the sudden change on Winfixer's end with delivery of their ad.

Thank you for helping me with this, I really appreciate it!

Geoff Gieron

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myGeek.com

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602-265-5242

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geoff@mygeek.com

!DSPAM:42f8fe8445442048921300!

From: Kristy Ross
Sent: Tuesday, August 09, 2005 12:34 PM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

Thanks this is helping.. theyre going through all the links now. Apparently they did some database upgrade and messed up all their links. Hopefully it will all be fixed shortly. I'll keep you updated.

Thanks a bunch,
Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 3:14 PM
Subject: RE: Account Update

Kristy - here is an example of your winfixer ad vs. another one that we currently have in the network.
- hope this helps out a bit.

<http://winfixer.com/pages/scanner/?aid=mgp=3ax=0> (another account that is working correctly)

<http://www.winfixer.com/pages/scanner/?aid=mgwfron3lid=RONp=3ax=0> (your link with pop/auto download issue)

Geoff Gieron
myGeek.com

From: Kristy Ross [mailto:kristy@globedat.com]
Sent: Tuesday, August 09, 2005 11:50 AM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

Im not sure if you have any indication as to when this may have happened? I'm trying to offer them information to look at when it may have occurred. Do you think it was just today or earlier?

Thanks,
Kristy

----- Original Message -----

MGC00203
ROSS000027

p5

From: Geoff Gieron

To: 'Kristy Ross'

Sent: Tuesday, August 09, 2005 2:46 PM

Subject: Account Update

Kristy,

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Thank you for helping me with this, I really appreciate it!

Geoff Gieron

Director, Advertiser Management Services

myGeek.com

AdOn Network

602-265-5242

602-297-4219 (fax)

geoff@mygeek.com

!DSPAM: 42f9009455524376618803!

MGC00204
ROSS000028

p6

From: Kristy Ross
Sent: Tuesday, August 09, 2005 12:59 PM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

I think the issue is fixed. Please let me know. I am trying to check in Internet Explorer, but it is hard for me to see popups or not as I use Safari.

Thanks,
Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 3:14 PM
Subject: RE: Account Update

Kristy - here is an example of your winfixer ad vs. another one that we currently have in the network.
- hope this helps out a bit.

<http://winfixer.com/pages/scanner/?aid=mgp=3ax=0> (another account that is working correctly)

<http://www.winfixer.com/pages/scanner/?aid=mgvfron3lid=RONp=3ax=0> (your link with pop/auto download issue)

Geoff Gieron

myGeek.com

From: Kristy Ross [mailto:kristy@globedat.com]
Sent: Tuesday, August 09, 2005 11:50 AM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

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Thanks,

Kristy

----- Original Message -----

ROSS000029

p. 7

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 2:46 PM
Subject: Account Update

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Thank you for helping me with this, I really appreciate it!

Geoff Gieron
Director, Advertiser Management Services
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602-297-4219 (fax)
geoff@mygeek.com

!DSPAM:42f9009455524376618803!

ROSS000030

P. 8

From: Kristy Ross
Sent: Tuesday, August 09, 2005 02:06 PM
To: Geoff Gieron
Subject: Re: Account Update

Great thanks.. whats the holdup on the opening the other account? Don't they check the links at the same time or?

Thanks a bunch for this.. unfortunately this company seems to change their product all the time and we've had quite a few issues with them in the past.. and unfortunately lost advertisers because of it as well. We've warned them numerous times, but it continues to occur .. less than it used to though.

What about the new source of ROW traffic.. did that ever start?

Thanks,
Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 5:00 PM
Subject: RE: Account Update

Kristy - 90012 was just opened back up to 110077 as a source. Looks like tomorrow will be when we can open back up 89573 to that source. Just wanted to update you as soon as I got off the phone with them.

Thanks

Geoff Gieron
myGeek.com

From: Kristy Ross [mailto:kristy@globedat.com]
Sent: Tuesday, August 09, 2005 12:59 PM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

I think the issue is fixed. Please let me know. I am trying to check in Internet Explorer, but it is hard for me to see popups or not as I use Safari.

Thanks,

Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'

ROSS000031

p. 9

From: Kristy Ross
Sent: Tuesday, August 09, 2005 04:10 PM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

Thanks for the help really. We have lost people in the past, so I know what incidents like this can create. Your team at Mygeek is definitely the best we have dealt with.. and we advertise everywhere. Usually it's hours and days for a response :)

Thanks.. hope the weather is treating you well out there.. it's pouring over here.

Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 6:58 PM
Subject: RE: Account Update

Great news Kristy - just got the ok to put everything back to how it was. Thank you for hangin with me while I bugged them endlessly and begged for forgiveness!

I really enjoy working with you and appreciate how responsive you are!!

Geoff Gieron

myGeek.com

From: Kristy Ross [mailto:kristy@globedat.com]
Sent: Tuesday, August 09, 2005 3:17 PM
To: Geoff Gieron
Subject: Re: Account Update

Sure if we can add it. I figured it was a main source since most of the traffic came from them other places :)

Thanks a bunch for all the help.

Kristy

----- Original Message -----

From: Geoff Gieron
To: 'Kristy Ross'
Sent: Tuesday, August 09, 2005 6:08 PM

ROSS000032

p. 10

Subject: RE: Account Update

This traffic source doesn't pick up traffic at that rate - though a handful of clicks make it through. I just did that because though because there is no threat there I can go ahead and turn it on if you'd like.

I might be able to get this source back up for 89573 before I leave tonight - I am waiting for word from the team.

Geoff Gieron

myGeek.com

From: Kristy Ross [mailto:kristy@globedat.com]
Sent: Tuesday, August 09, 2005 2:14 PM
To: Geoff Gieron
Subject: Re: Account Update

Geoff,

It also looks like the ron account winfixerron2 (90448) is still not marked as having traffic from 110077. Is this one still on hold also or it just has not been turned back on?

Thanks,

Kristy

----- Original Message -----

From: Geoff Gieron

To: 'Kristy Ross'

Sent: Tuesday, August 09, 2005 5:00 PM

Subject: RE: Account Update

Kristy - 90012 was just opened back up to 110077 as a source. Looks like tomorrow will be when we can open back up 89573 to that source. Just wanted to update you as soon as I got off the phone with them.

Thanks

Geoff Gieron

myGeek.com

ROSS000033

p. 11

RDx 23

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 NORTHERN DIVISION
4 FEDERAL TRADE COMMISSION, Civil No. RDB-08-3233
5 Plaintiff, Baltimore, Maryland
6 v. June 9, 2009
7 INNOVATIVE MARKETING, INC., 2:00 p.m.
8 et al.,
9 Defendants.
10
11 TRANSCRIPT OF MOTIONS HEARING
12 BEFORE THE HONORABLE RICHARD D. BENNETT
13 UNITED STATES DISTRICT JUDGE
14
15 APPEARANCES:
16 For the Plaintiff: Federal Trade Commission
17 By: ETHAN R. ARENSON, ESQUIRE
18 COLLEEN ROBBINS, ESQUIRE
19 600 Pennsylvania Avenue, NW
20 Washington, D.C. 20580
21 For the Defendants: Orrick Herrington and Sutcliffe LLP
22 By: MICHAEL J. MADIGAN, ESQUIRE
23 GARRETT RASMUSSEN, ESQUIRE
24 JONATHAN DIRENFELD, ESQUIRE
25 1152 15th Street, NW
Washington, D.C. 20005
Winston and Strawn LLP
By: DAN K. WEBB, ESQUIRE
35 W. Wacker Drive
Chicago, Illinois 60601
Patton Boggs LLP
By: BENJAMIN WOOD, ESQUIRE
2550 M Street, NW
Washington, D.C. 20037

1

1 PROCEEDINGS
2 THE COURT: Madam Clerk, if you'll call the case,
3 please?
4 THE CLERK: The case pending before this court is Civil
5 Action Number RDB-08-CV-3233, Federal Trade Commission v.
6 Innovative Marketing, Inc., et al. for pending motions hearing.
7 THE COURT: Good afternoon, everyone. If you'll
8 identify yourselves for the record? On behalf of the Federal
9 Trade Commission, if counsel would introduce themselves for the
10 record, please?
11 MR. ARENSON: Good afternoon, Your Honor. Ethan
12 Arenson on behalf of the Federal Trade Commission.
13 MS. ROBBINS: And Colleen Robbins on behalf of the
14 Federal Trade Commission.
15 THE COURT: Mr. Arenson and Ms. Robbins, nice to see
16 you as always and I believe you have Jennifer Oberhausen, a law
17 clerk, behind you. Is that Ms. Oberhausen? Nice to see you. On
18 behalf of the defendants?
19 MR. MADIGAN: Michael Madigan, Your Honor.
20 THE COURT: Mr. Madigan, nice to see you as always.
21 MR. MADIGAN: And I represent Mr. D'Souza.
22 THE COURT: And you represent?
23 MR. MADIGAN: Marc D'Souza.
24 THE COURT: And you represent the defendant, Marc
25 D'Souza. Let me just get a little score card here ready. Wait a

3

1 Court Reporter Lisa K. Bankins RMR
2 101 West Lombard Street
3 Room 5515
4 Baltimore, Maryland 21201
5
6 Proceedings recorded by mechanical stenography,
7 transcript produced by notereading.
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2

1 minute. Hold on one second. Wait a minute. All right. And
2 Mr. Daniel Webb. Is that correct?
3 MR. WEBB: Dan Webb, yes, on behalf of the individual
4 defendant, Kristy Ross, Your Honor.
5 THE COURT: Yes. Kristy Ross. Hold on one second.
6 All right. Thank you. And Mr. Wood?
7 MR. WOOD: Good afternoon, Your Honor. Ben Wood on
8 behalf of defendant, Sam Jain.
9 THE COURT: All right. All right. Thank you very
10 much. And then we have Garrett Rasmussen?
11 MR. RASMUSSEN: Yes. Good afternoon, Your Honor.
12 THE COURT: Good afternoon.
13 MR. RASMUSSEN: Representing Maurice D'Souza, the
14 relief defendant.
15 THE COURT: All right. Hold on one second. All right.
16 Thank you. And then we have Jonathan Direnfeld and Carolyn
17 Gerland. You all are lawyers also with the respective firms
18 here. Are you summer associates or --
19 MR. DIRENFELD: Lawyers, Your Honor.
20 THE COURT: Lawyers. Both of you. So you've hit the
21 road of reality. You're not summer associates. Is that correct?
22 MR. DIRENFELD: Yes, I have.
23 THE COURT: All right. Well, it's nice to see you all.
24 Welcome. Okay. We have a series of, quite a few motions here
25 pending and I apologize for some of these piling up, counsel. As

4

1 some of you may or may not know, I was involved in an eight-week
 2 death penalty case which took up a lot of my docket. The end
 3 result of which was as exactly people knew it would be some nine
 4 weeks before the case started, but that's another matter. So it
 5 fouled up my docket a little bit. But I'm catching up now. And
 6 we have a lengthy series of motions here. What I would propose
 7 to do if I can is I've divided this into six categories. The
 8 motions to stay, the contempt motion will be the second category,
 9 motions to strike for extension of time is the third category,
 10 motion to modify the preliminary injunction, the fourth category,
 11 motion to dismiss for failure to join necessary and indispensable
 12 party is essentially the fifth category, a motion and then a
 13 motion for lack of personal jurisdiction, which you have filed,
 14 Mr. Madigan, on behalf of -- I'm sorry -- Mr. Rasmussen on behalf
 15 of Mr. Maurice D'Souza.

16 MR. RASMUSSEN: Correct.

17 THE COURT: Okay. That's fine. All right. So that
 18 they are the categories in which I propose to address these
 19 motions. Is there any objection by anybody to my --

20 MR. MADIGAN: No, Your Honor.

21 MR. WEBB: No.

22 THE COURT: -- categorizing in that fashion? Okay. So
 23 we're going to start first with the motions to stay which have --
 24 there are three motions. There's Sam Jain's motion to stay,
 25 paper number 45, Kristy Ross' motion to stay, temporary stay,

5

1 for his arrest and he's a fugitive under federal law, is he not?

2 MR. WOOD: There is a bench warrant for his arrest,
 3 Your Honor.

4 THE COURT: All right. Okay. And can you tell me how
 5 long has that bench warrant been issued?

6 MR. WOOD: My understanding it was at the end of
 7 January. I believe maybe January the 26th.

8 THE COURT: Um-hum. So we're looking on five months.
 9 Four and a half months.

10 MR. WOOD: And I understand that might have
 11 implications for our request for --

12 THE COURT: Well, it may. I'm just saying that it
 13 certainly appears that one thing if it's four or five days, even
 14 a bad week, but after four and a half months, I'd say he's in the
 15 fugitive category.

16 MR. WOOD: I don't represent him in that action, Your
 17 Honor, but --

18 THE COURT: Richard Kimball was out as the fugitive for
 19 nine years on television. So I would certainly think that four
 20 and a half months would constitute your client as a fugitive.

21 MR. WOOD: There's been some implication that that
 22 renders the request for a stay indefinite.

23 THE COURT: Sure.

24 MR. WOOD: I don't think it is. I think there's some
 25 things that can be built into the order.

7

1 paper number 48, and then the first section of Marc D'Souza's
 2 motion for temporary stay and modification of preliminary
 3 injunction, which is paper number 71 and I'll be glad to hear
 4 from counsel on that and we can proceed. Whoever wants to go
 5 first. It would be good if I could first hear from you,
 6 Mr. Wood. You represent Sam Jain. Is that correct?

7 MR. WOOD: I do, Your Honor.

8 THE COURT: Is it correct that he is a fugitive?

9 MR. WOOD: There's a bench warrant for his arrest in
 10 California. He missed a required court hearing in that action in
 11 California.

12 THE COURT: All right. He's yet to be here in this
 13 court and I gather he's not been in the United States District
 14 Court for the Northern District of Illinois.

15 MR. WOOD: He's not been in the court in Illinois and
 16 he's also not missed any appearances in Illinois. As you know,
 17 Your Honor, he voluntarily waived service in this matter --

18 THE COURT: Yes.

19 MR. WOOD: -- and he submitted to the --

20 THE COURT: Yes. So he's accepted service of process
 21 here. But according to my review, it appears that he, that a
 22 federal judge -- is that in the Central District of California?

23 MR. WOOD: It is, Your Honor.

24 THE COURT: All right. A United States District judge
 25 for the Central District in California has issued a bench warrant

6

1 THE COURT: Right.

2 MR. WOOD: To account for that, there could be a
 3 provision, a standard provision in stay orders. The department
 4 can petition for modification or lifting of the stay. The stay
 5 could initially be for a definite period of time with the
 6 possibility that the parties could petition for an extension or
 7 for a lifting --

8 THE COURT: All right. Why don't I -- you all can
 9 decide who wants to go first on the three motions for stay. But
 10 I just wanted to confirm that we have a situation on one of the
 11 defendants here is a fugitive and there's a federal -- has there
 12 been an indictment returned in this case yet in either Illinois
 13 or California?

14 MR. WOOD: He had been indicted in California.

15 THE COURT: He has been indicted in California. Okay.

16 MR. WOOD: Not in Illinois, although he was told back
 17 in September that his indictment was imminent in the Illinois
 18 investigation.

19 THE COURT: All right. We'll have to defer to Mr. Webb
 20 or Mr. Madigan I guess in terms of how the politics are working
 21 out between the respective U.S. Attorney's Offices in terms of
 22 who's going first and second in these cases.

23 MR. WOOD: That's a good question.

24 THE COURT: I'm sure they're coordinating very well.
 25 I'm sure. So all right. Well, thank you. Whoever wants to go

8

1 first then. I just wanted to confirm then that your client is a
 2 fugitive in certainly my eyes, Mr. Wood. But I wanted to make
 3 sure I wasn't pulling the trigger too quickly on that. Mr.
 4 Madigan, I'd be glad to hear from you, sir. And you're free to
 5 stay behind the table or use the podium, whatever you want to do,
 6 sir.

7 MR. MADIGAN: I'll try the podium, Your Honor. I drew
 8 the short straw or long straw, whichever the case may be to go
 9 first. Let me start, Your Honor, by telling you a little bit
 10 about Marc D'Souza who I represent.

11 THE COURT: Right.

12 MR. MADIGAN: He is neither a citizen nor resident of
 13 the United States and never has been. He's never been in the
 14 great State of Maryland. He's a 30-year-old individual
 15 entrepreneur who formed and operated his own Internet business
 16 under the DBA trade name, Integrated Net Solutions. He's a
 17 graduate of the University of Toronto and he's a graduate of
 18 Boston College Law School and he's never been in trouble in his
 19 life. He's never been accused of any illegal conduct and he's
 20 certainly, he's never been convicted of anything. This case
 21 began, Your Honor, as you know on an ex parte basis back in
 22 December. On December 2nd, the Federal Trade Commission came to
 23 the court and obtained a temporary restraining order.
 24 Mr. D'Souza was not represented at that time. We were not
 25 retained to represent him. He was without counsel. The case

9

1 Your Honor will see that all of the allegations in the complaint
 2 deal with conduct in '07 and '08 and that the consumer complaints
 3 that are filed, there's one by Mr. Latent, Mr. Church, Mr. Davis,
 4 Mr. Heard, Mrs. Marcelyn, Ms. Mullin, Pritchard, Randall,
 5 Rituals, Thompson, the school teacher one Your Honor is familiar
 6 with. Every single one is in '07 and '08. There is no evidence
 7 other than conclusory statements that the Supreme Court has just
 8 made clear in the Ashcroft case is not nearly enough that are
 9 made against Mr. D'Souza in the complaint. And interestingly, at
 10 that time, at the time of the hearing, Your Honor asked, it was
 11 not volunteered by the commission, but Your Honor asked whether
 12 there was any companion criminal investigation going on. And the
 13 answer and I quote, well, Your Honor, we know a search warrant
 14 has been executed at the offices of ByteHosting and beyond that,
 15 I'd refer you to D.O.J. Now we have filed and the commission has
 16 asked for an extension of time.

17 THE COURT: ByteHosting being a company that's
 18 registered in Ohio. Correct?

19 MR. MADIGAN: Yes. And that's a company associated
 20 with a person named Reno who is not presently before the Court.
 21 And the fact of the matter is that the FTC had received or soon
 22 did receive, we don't know exactly when, all of the documents
 23 from the search warrant and we filed both an interrogatory and a
 24 document request that they have requested an extension of time on
 25 to document all of the context between the criminal U.S.

11

1 then proceeded before Your Honor for the first time on
 2 December 12th I believe it was.

3 THE COURT: Chief Judge Legg had already entered a
 4 temporary restraining order. It came before me for a hearing on
 5 preliminary injunction.

6 MR. MADIGAN: Yes. And Mr. D'Souza at that time was
 7 not represented. We were not retained. He was not served at
 8 that time either and so we were not obviously able to be heard on
 9 that date. Subsequently, we were retained. We did accept
 10 service on behalf of Mr. D'Souza and we're here today to tell you
 11 what we would have told you had we been here on the day that the
 12 preliminary injunction hearing occurred.

13 THE COURT: And I will certainly address your pending
 14 motion to dismiss for lack of personal jurisdiction later this
 15 afternoon or later in this hearing. If you'll just stay focused
 16 on the motion to stay initially, Mr. Madigan?

17 MR. MADIGAN: Yes, Your Honor. We moved to stay here,
 18 Your Honor. The vast majority of the and I think this is
 19 relevant and I will get to the case law in a moment on the motion
 20 to stay. The vast majority of the allegations in the complaint
 21 have nothing whatsoever to do with Mr. D'Souza. The FTC concedes
 22 that Mr. D'Souza who operated under the Net Solutions moniker, so
 23 to speak, as I mentioned, left any sort of business relationship
 24 having to do with the matters before the Court on December of
 25 '06. And if Your Honor looks at the complaint that was filed,

10

1 Attorney's Office in Chicago, Illinois and --

2 THE COURT: You mean the criminal division of the U.S.
 3 Attorney's Office.

4 MR. MADIGAN: Yes. The Criminal Division of the U.S.
 5 Attorney's Office in Chicago. Now I have met personally with
 6 Mr. Ferrara who was heading the investigation and for the first
 7 time in February, I must say that as soon as we were retained and
 8 I learned of that which was not until January, we requested a
 9 meeting and didn't get one until February. At which time, I was
 10 told that my client was a target of the investigation, that
 11 indictments were imminent and I have been told since that time
 12 that there will be an indictment and that my client will be -- as
 13 Your Honor knows with Your Honor's experience they can't say, you
 14 know, what a grand jury will do, but they indicate that it's
 15 their belief that my client will be named in the indictment.

16 THE COURT: Did you ask when the last time the grand
 17 jury returned a non-true bill in that district?

18 MR. MADIGAN: No, Your Honor, I did not, which of
 19 course they do have the power to do.

20 THE COURT: It's been 30 years or 35 years here in
 21 Maryland I believe.

22 MR. MADIGAN: I think it's probably been the same in
 23 Chicago. But in any event, we also know recently that on
 24 information and belief that there was a search warrant executed
 25 over in the Ukraine and that the Chicago F.B.I. agents were

12

1 present at that search. I don't know what the FTC may know about
2 that or what information it has --

3 THE COURT: A search warrant executed in the Ukraine on
4 whom?

5 MR. MADIGAN: On whatever facility was over -- I have
6 very sketchy information other than the fact that there were
7 F.B.I. agents from Chicago there indicating once again that this
8 is a very active and serious criminal investigation. And that is
9 the reason, Your Honor, that we are seeking a stay of this
10 action. We have asked for it to be stayed for six months. It's
11 obviously in the complete discretion of this Court. We have
12 submitted a series of cases that support our position to grant
13 that stay. I might say that the FTC's position in its brief if I
14 may quote it is that the defendant's argument has been soundly
15 rejected by courts across the country. And that of course is
16 flatly untrue and is not supported even by the cases cited by the
17 FTC which I will get to.

18 We have cited I think some key cases such as the
19 Healthsouth case which and the Chow case that are in the papers
20 before Your Honor and the Brock v. Toklow case, all of which say
21 that it is of great concern when our government and we only have
22 one government is bringing a case, cases simultaneously involving
23 identical facts, one criminal and one civil and this case would
24 be a poster child for that principle. There's absolutely no
25 question but that the investigation is precisely the same and

13

1 would not produce in a civil case? .

2 MR. MADIGAN: Well, in the civil case already we have
3 seen the FTC attempt to take Maurice's deposition. They could
4 attempt to take our deposition or all the people's depositions --

5 THE COURT: And there can be an assertion of the Fifth
6 Amendment privilege. Correct?

7 MR. MADIGAN: And we would then have to assert at our
8 peril, we would have to assert the Fifth Amendment. We're
9 already being --

10 THE COURT: And where would there be the peril if your
11 client asserted the Fifth Amendment in this civil context?

12 MR. MADIGAN: Well, it would be, it would damage the
13 civil claim because there would be an inference that would arise
14 that would be detrimental to the claim --

15 THE COURT: That would only be if it was deemed to be
16 admissible in the civil action ultimately. Isn't that correct?

17 MR. MADIGAN: Yes. But I think that there is some case
18 law out there that's quite dangerous that if in a civil
19 proceeding, you take the Fifth Amendment whether it can be
20 introduced in terms of an inference against the person and --

21 THE COURT: It's not an absolute that it is admissible,
22 is it, Mr. Madigan?

23 MR. MADIGAN: Well, I don't know. I certainly have
24 seen a number of cases over the years where it certainly was
25 admissible. In fact in the FTC context, I have been involved in

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1 indeed in my conversations in Chicago with the criminal
2 investigation when we were discussing fines, the suggestion was
3 made, well, that could be taken care of by FTC damage pool.
4 There's no question that these are parallel investigations that
5 is being done intentionally. And under the case law of the Chow
6 case and the Healthsouth in particular, the court goes out of its
7 way to talk about the danger of this kind of proceeding. And in
8 the Healthsouth case relevant to this case, the defendant there,
9 Mr. Scrusby had not yet been indicted and that was one of the
10 government's arguments. Well, he hasn't been indicted yet. So,
11 you know, no problem here. We don't know whether he will be. As
12 Your Honor pointed out, it's up to the grand jury to decide. But
13 the court held that although the Defendant Scrusby has not yet
14 been indicted, no one has represented to the Court that such
15 indictment is anything but an eventuality. And the court went on
16 to say there's a special danger, there's a special danger to this
17 kind of catch 22 situation where the defendant is forced to give
18 up his Fifth Amendment rights, the defendant is forced to do, to
19 provide discovery for the government with respect to the criminal
20 proceeding that it would not under our rules ever have to provide
21 and is put in this catch 22 situation by having two different
22 proceedings on the identical situation and obviously closely
23 coordinated.

24 THE COURT: What discovery does the defendant
25 necessarily have to produce in a criminal case that he or she

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1 numerous cases where they have hauled the witness in and told
2 him, in fact the court stopped it through a motion to stay.
3 Hauled the witness in who was the putative criminal defendant and
4 asked him, you know, when have you stopped beating his wife and
5 isn't it true that he's the biggest crook in the world and didn't
6 you steal \$200 million, each of which he took the Fifth Amendment
7 to and then they tried to use inferences in the civil proceeding
8 and so the courts have said that that's why we have our terrific
9 district court judges to look at this with discretion and see if
10 there's any reason for this kind of thing. We have a very good
11 defense to the FTC action and we want to provide that defense.
12 But we cannot do it in the present circumstances with the
13 criminal prosecution hanging over our heads and having been told
14 that it's an almost certainty that we're going to be indicted and
15 the government is the one that has put us in this position, Your
16 Honor. And the cases I might say with respect to the FTC cases
17 and its broad statement that there's no law out there whatsoever.
18 If Your Honor looks at all of the cases they've cited, none of
19 them even stand for that proposition. The Arden case doesn't
20 even involve two cases brought by the government. The Avalon Bay
21 case says that courts have been very concerned about gaining an
22 advantage in the civil case by forcing the party to choose
23 between exposing themselves to criminal prosecution by testifying
24 or asserting the Fifth Amendment. The Mid-Atlantic Toyota case
25 that they cite in Harbison, the defendants are not even identified

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1 as targets. And in the Phillips case that they cite if the court
2 held that it's within the court's discretion and attempt to
3 balance this, that the court must make "some attempt to
4 accommodate the civil litigant's Fifth Amendments right. So what
5 we're asking for, Your Honor, is a limited stay. As I said, we
6 are anxious to defend this case. We would like to defend it and
7 we're not able to defend it. And the reason we're not able to
8 defend it is because the government in our view in a misuse of
9 its power is bringing intentionally these two separate
10 enforcement actions, one civil and one criminal, to put us in
11 this catch 22 situation.

12 Now that is our argument with respect to the motion to
13 stay, Your Honor. We also have arguments on the modification.
14 I'll leave those until later --

15 THE COURT: Why don't you wait for those? That's sort
16 of what I put in in terms of Category 4 of the six items here.

17 MR. MADIGAN: Right.

18 THE COURT: Your position is that you've asked for a
19 limited stay. I have noted that at least in this district, Judge
20 Young previously dealt with the standard to at least have been
21 applied in this district in the Mid-Atlantic Toyota Antitrust
22 litigation case, a Federal Rules Decision from 1981 and it seems
23 to be very much a litmus test here in this district, in this
24 courthouse with respect to determining whether to stay a civil
25 proceeding in respond to a pending or a potential criminal

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1 have a Fifth Amendment right and they were not targets of a
2 criminal investigation. So I think that makes that case
3 inapposite with respect to our case. Obviously, the standards
4 are what we believe we can meet.

5 THE COURT: All right. Thank you very much,
6 Mr. Madigan. Also the defendant, Kristy Ross, has also filed a
7 motion for temporary stay, paper number 48. Mr. Webb, I'll be
8 glad to hear from you.

9 MR. WEBB: Yes, Your Honor. Dan Webb on behalf of the
10 defendant, Kristy Ross. I don't want to repeat what my friend
11 and co-counsel just told the Court. But let me try to be just to
12 the point. Here's why I'm here on behalf of Kristy Ross.

13 THE COURT: Has your client been indicted in
14 California?

15 MR. WEBB: No.

16 THE COURT: But she's about to be indicted in Chicago?

17 MR. WEBB: They told us in Chicago they're going to
18 indict her. It's real and they took -- this is a 29-year-old
19 woman that's never had any problem with the law. She's got her
20 whole life ahead of her and they say they are going to indict her
21 and the reason I'm here, Your Honor, is because they've never
22 served her. Just so you know, she's never been served with
23 process in this case today. I have agreed on her behalf and with
24 her permission to come before the Court. Right now if I did not
25 do that, I do not believe under the case law there's personal

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1 proceeding and essentially, Judge Young's factors were the
2 interest of the plaintiffs in proceeding expeditiously with a
3 civil action as balanced against the prejudice to the plaintiffs
4 if delay; two, the burden on defendants; three, the convenience
5 to the Court; four, the interest of person who is not party to
6 the civil litigation; and five, the public interest and I'll
7 certainly be glad to hear from your co-counsel here. We do have
8 a situation here, do we not, Mr. Madigan, where essentially it's
9 alleged, is it not, that we have millions of people who suffered
10 from this alleged fraud. Isn't that correct?

11 MR. MADIGAN: Well, Your Honor, when you look through
12 the papers that were filed, most of them ex parte when we were
13 not able to be here, you'll see all kinds of wild numbers, 40
14 million, 50 million and higher. But what you'll see and what is
15 the fact is that there were 1,000, only 1,000, exactly 1,000
16 complaints made to the FTC and they're all complaining about a
17 particular piece of software which is only one small part of
18 certainly of the business that my client was involved in and so
19 that takes you to 37,000, Your Honor, if all of those thousand
20 people, you know, suffered the damages. These other numbers are
21 taken out of the air and many of them are taken out of this
22 Canadian lawsuit that you will hear about and you've heard about
23 in the papers that I'd be happy to address whenever the time is
24 appropriate. If I might say about that Maryland case, the
25 Mid-Atlantic, there were corporate defendants there who didn't

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1 jurisdiction over here. She's here because of what I told her.
2 We're going to bring this in front of a federal judge because she
3 believes right now the government, the FTC before she's indicted
4 wants her to be held in contempt of court for having done nothing
5 wrong and then they want you to put her in jail. And so I'm
6 going to tell you concisely why I think she's entitled to a stay
7 under the particular facts of this case.

8 THE COURT: Has she consented to the jurisdiction of
9 this court?

10 MR. WEBB: Yes. She has. We've consented. We're
11 here.

12 THE COURT: I thought she had, but I wasn't --

13 MR. WEBB: I'm sorry. I should have made that clear.

14 We're here and we've consented to the jurisdiction of the court
15 and we're not challenging jurisdiction because we actually want
16 to be here to present our position including the stay motion
17 because she doesn't want to be held in contempt and she doesn't
18 want to be put in jail on a contempt before she even gets a
19 criminal trial. So here we go. The case law is clear that if
20 you decide based on specific facts involving Kristy Ross that
21 she's entitled to a stay because of the interest of justice, you
22 can do that. Number two, the case law is very clear when you cut
23 through it all that this issue of interfering with a defendant's
24 Fifth Amendment rights in a criminal case is a really important
25 factor to consider when trying to do the balancing test Your

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1 Honor just articulated. The real, the real balance is between
 2 the defendant's prejudice and the government's right to an
 3 expeditious proceeding and I'll talk about the other factors.
 4 But I think those are the two big ones. So let's talk about
 5 Kristy Ross. We've been told by the government in Chicago, the
 6 U.S. Attorney's Office, that she will be indicted. So I'm not in
 7 here in some hypothetical case. They said she's going to be
 8 indicted within weeks. She could be indicted now and there could
 9 be some seal order. I don't know, but I'm not in here
 10 hypothetically. They told us she's going to be indicted. Number
 11 two, what she's going to be indicted on is the exact same fraud
 12 case that's before you, which the cases point out that's pretty
 13 important because if it's the same fact scenario and the
 14 defendant's Fifth Amendment rights are being interfered with,
 15 that's a pretty big deal. So we know that that's --

16 THE COURT: Does that amount to a constitutional
 17 infringement if the defendant has to weigh self-incrimination
 18 issues in a parallel proceeding, Mr. Webb?

19 MR. WEBB: Yes, it is, Your Honor.

20 THE COURT: It's a constitutional infringement.

21 MR. WEBB: It is and let me go to the cases.

22 THE COURT: All right. There are cases that have held
 23 to the contrary.

24 MR. WEBB: There are and let me talk about that. Let
 25 me talk specifically what the government is trying to do to her,

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1 which is different than Mr. D'Souza, which is why she is going to
 2 suffer so much prejudice in this case and I want to kind of slow
 3 down and make sure that this is clear. The normal case where you
 4 have a parallel civil case and a criminal case, the normal
 5 prejudice which some cases say is not enough and some say it is,
 6 but the normal prejudice is the Hobson's choice where a defendant
 7 has the freedom to choose between exercising the Fifth Amendment
 8 in a civil case, but suffering an adverse inference if you decide
 9 or the government decides to use it or waiving the Fifth
 10 Amendment, incriminating yourself in a criminal case, but
 11 avoiding a huge civil liability. I've got all kinds of cases
 12 that say that in and of itself is enough to get a stay. But I
 13 have something much worse here and I want to make sure -- it's
 14 ten times worse with Kristy Ross because if the government were
 15 to say that she can just take her Fifth Amendment because she's
 16 going to incriminate herself and we're not going to use the
 17 adverse inference, we'll go ahead and give you a trial in this
 18 case, in this case before Your Honor in which we've looked into
 19 the facts and I'm not going to get into it, but we can prove her
 20 innocence. If they would say that, I'd be happy to not even have
 21 a stay. We'd just go forward before you right now if that could
 22 be the case. Here's what they're saying. They're actually
 23 saying because of their -- they allege that because they say two
 24 years ago, she held a corporate position with this company and
 25 because of that, they're saying today she cannot --

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1 THE COURT: Corporate position with which company?

2 MR. WEBB: With this company called I.M.I.

3 THE COURT: Innovative Marketing, Incorporated.

4 MR. WEBB: Yes.

5 THE COURT: All right.

6 MR. WEBB: Here's what the facts I think would come out
 7 in the hearing. That she did have a position of marketing and
 8 sales with that company before the P.I. in this case. So by the
 9 time the P.I. came down, she did not have that position. She was
 10 not even working for the company and she has no authority on
 11 behalf of the company to do anything. And yet, the reason we're
 12 here and asking you to send her to jail, they're saying that she
 13 cannot take the Fifth Amendment. They're saying that in response
 14 to the P.I. because of the way they drafted it and because they
 15 say two years ago she held a corporate position, she has to
 16 because as a corporation, as a corporate officer, she has to give
 17 up her Fifth Amendment and she has to incriminate herself in this
 18 proceeding.

19 THE COURT: Well, I think the government is saying that
 20 as a corporate officer, Innovative Marketing, the corporation,
 21 Innovative Marketing cannot assert a Fifth Amendment privilege
 22 and the government takes the position that with respect to any
 23 documents or any information they're seeking, they're just
 24 seeking corporate information from her if she has any as a former
 25 corporate official. I think essentially that's the position of

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1 the government.

2 MR. WEBB: And she doesn't have it. So she has nothing
 3 in her possession whatsoever. They're saying more than that.
 4 They're trying to say right now, for example, that she ought to
 5 be able to go out and make sure that the corporation complies
 6 with seven different provisions of the P.I. that she has no
 7 ability or control over whatsoever. But my only point, Your
 8 Honor, as far as prejudice to Kristy Ross, the government is not
 9 saying just let her take the Fifth Amendment and we'll try to
 10 argue an adverse inference or let her take the Fifth and we won't
 11 argue the adverse inference. They are saying that she cannot
 12 take the Fifth. Because she's a corporate officer, she will
 13 incriminate herself. But because she has to do this in order to
 14 bring the corporation into compliance, she has to do it. And if
 15 she doesn't do it, she goes to jail. And so that's why we're
 16 here for a stay. I'm not looking -- sixty days, ninety days, a
 17 hundred twenty days, come back and talk to Your Honor. I've been
 18 in this game all my life. Maybe she won't get indicted. Okay.
 19 I mean I've been told before my client is going to be indicted
 20 and they didn't. That could happen. Right? That will remove
 21 that problem. Number two, she gets indicted, but we get a short
 22 trial date because, Your Honor, we've looked into this. We've
 23 got experts. We can have a quick -- we've got experts that can
 24 testify that what the government --

25 THE COURT: A short trial date in the criminal case?

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1 MR. WEBB: In the criminal case. Let's get a short
2 trial -- and then you decide to let us go ahead and try the case
3 because if we do try that case and I know Your Honor's background
4 and experience, I've never seen a civil case that was parallel
5 like this. If the criminal case goes forward first, this case
6 will never end up going to trial because what will happen is that
7 if my client is convicted, should there be a restitution order
8 and this case is over because there's nothing left in this case.
9 Or, number two, she'll be acquitted and a compromise will get
10 worked out somewhere. So as far as judicial economy waiting for
11 a few months to see what happens in the criminal case will save
12 everyone including the judiciary the duplicative nature of dual
13 proceedings and --

14 THE COURT: Mr. Webb, it sounds like if there's a
15 resolution of the Fifth Amendment issue, that there may or may
16 not even be a need from your point of view of a stay for your
17 client if there's a resolution of the Fifth Amendment issue.

18 MR. WEBB: By the way, if the government decides that
19 they're not going to use her invocation against her as an adverse
20 inference and they won't make her give up her Fifth Amendment,
21 just let her invoke the Fifth Amendment and let this case proceed
22 in front of Your Honor, we're here. I'm here. I mean I've --

23 THE COURT: I guess my point is ultimately that's what
24 I have to address today. It's up to the Court to decide whether
25 or not there's an appropriate assertion of the Fifth Amendment

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1 just so you know, Kristy Ross has notified the government and
2 we've set forth in our papers, the preliminary injunction is in
3 place. She is barred from ever engaging in this kind of conduct.
4 She's agreed to it. The government doesn't even allege that
5 she's violating any of the provisions of the injunction. All
6 they're contending is that she's not trying to get the
7 corporation to comply. And so we agree, if we agree, if we agree
8 which we have that the conduct is over, that's what the FTC is
9 all about is to make sure that consumers, somehow or not, they
10 say that there's a bad fraud scheme that went on out there.
11 We'll show not. But we've stopped it. It's gone. And so
12 there's no prejudice to the FTC. Consumers are fully protected
13 and I get my stay for ninety days or so so we can report back to
14 Your Honor on what's going on in Chicago as far as Kristy Ross
15 being indicted.

16 THE COURT: All right. Thank you very much, Mr. Webb.

17 MR. WEBB: Thank you.

18 THE COURT: There's also a third defendant, Sam Jain,
19 has moved to stay paper number 45. And Mr. Wood, I'll be glad to
20 hear from you.

21 MR. WOOD: Thank you, Your Honor. Your Honor, as
22 Mr. Madigan mentioned, the subject matter of the FTC's claims in
23 this action and the Chicago criminal investigation are identical.
24 That criminal investigation has also substantially advanced and
25 nine months ago, Mr. Jain was told that his indictment was

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1 privilege and if the Court determines that she's entitled to
2 assert a Fifth Amendment privilege on an individual basis and it
3 really is kind of a -- if I determine that it's a moot point as
4 to her status as a former corporate official of I.M.I. if I have
5 the acronym correct, then there really isn't any great issue from
6 your point of view in terms of a need for a stay.

7 MR. WEBB: Right. But the adverse inference. In other
8 words, the cases out there that -- if you took that away, yes.
9 If you make that ruling, then I'd get rid of one huge problem.
10 Okay. I still have the classic Hobson's choice issue which
11 Mr. D'Souza is basically arguing which is that if I'm compelled
12 to choose between taking the Fifth or having an adverse inference
13 against me in this case, then I still have an issue of a stay
14 because if the government would agree not to use the adverse
15 inference or if you enter in some kind of order that no adverse
16 inference can be used against Kristy Ross, then and we can go
17 ahead and invoke the Fifth Amendment, then I think my motion for
18 a stay does not have any basis any longer. If those two issues
19 are gone, the adverse inference as well as being forced to give
20 up her Fifth Amendment right, then I don't need a stay and we can
21 continue to proceed in this case in front of Your Honor and I
22 don't need the stay under those circumstances if those two things
23 go away. And so that's basically and by the way, as far as
24 prejudice to the government, balancing my prejudice against the
25 prejudice to the government, I don't get it. We've agreed --

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1 imminent in that proceeding.

2 THE COURT: What is the difference between the
3 California indictment and the potential Chicago indictment?

4 MR. WOOD: The California indictment, Your Honor,
5 relates to criminal copyright infringements unrelated to the
6 allegations of the FTC's complaint.

7 THE COURT: So the identical action is not the
8 California action in which your client has been indicted. It is
9 the pending Chicago indictment.

10 MR. WOOD: The pending Chicago indictment. That's
11 correct, Your Honor. The balance of prejudice here which is the
12 most important of the Mid-Atlantic Toyota factors strongly is in
13 favor of a stay --

14 THE COURT: What about the public interest with respect
15 to the number of people who have allegedly been harmed in the
16 public?

17 MR. WOOD: As Mr. Madigan mentioned, the number of
18 people who have actually complained to the FTC is only a
19 thousand.

20 THE COURT: But is that dispositive in terms of people
21 who actually complained? Usually, there's an acknowledged ripple
22 effect for each person who complains. There's an indefinite
23 degradation in terms of those who haven't complained who have
24 been victimized.

25 MR. WOOD: And I think as Mr. Webb mentioned, that most

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1 likely would be encompassed in any restitution order in the
2 criminal case, Your Honor, and so if the criminal investigation
3 is allowed to proceed and ultimately there is a finding against
4 these defendants and there's an order of restitution, that can
5 certainly would be rectified --

6 THE COURT: Mr. Wood, it's interesting from your point
7 of view because given that your client is a fugitive, I guess the
8 question is how long a stay.

9 MR. WOOD: Well, Your Honor --

10 THE COURT: Mr. Webb has indicated that he doesn't
11 really even need a stay if we had resolved the matter of adverse
12 inference and the right or lack thereof to assert the Fifth
13 Amendment. Mr. Madigan on behalf of Marc D'Souza suggested that
14 a six-month stay. It seems to me you're in a position of asking
15 for an indefinite stay.

16 MR. WOOD: Well, I don't think it is indefinite, Your
17 Honor. And there's no telling, I think at this point it's pure
18 speculation what Mr. Jain would do in Chicago. Clearly, he is
19 appearing in this proceeding. As I said, he's accepted service
20 --

21 THE COURT: Well, he's got a lawyer appearing. He
22 isn't appearing actually.

23 MR. WOOD: That's right.

24 THE COURT: Actually, if he appeared, it would be of
25 some interest to the U.S. Marshal here I suspect.

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1 MR. WOOD: It does, Your Honor.

2 THE COURT: Is your law firm representing him
3 nationwide?

4 MR. WOOD: No, Your Honor. Only in this particular
5 case.

6 THE COURT: All right.

7 MR. WOOD: As I mentioned, the balance of harms, the
8 balance of prejudices favors the stay. As Mr. Webb mentioned,
9 the defendants have agreed that the substantive provisions of the
10 P.I. would remain in place during the period of the stay
11 minimizing any prejudice to the FTC. On the other hand, Mr. Jain
12 is substantially prejudiced by forfeiting his chance of
13 adequately defending this action, choosing between asserting his
14 privilege and getting adverse inferences here or waiving that
15 privilege by testifying here and putting on a defense.

16 THE COURT: Do you agree with Mr. Webb that if there's
17 some indication by the Court with respect to the matter of the
18 admissibility of an adverse inference and addressing with respect
19 to individual assertions of the Fifth Amendment privilege as
20 opposed to assertions that may be within the corporate umbrella,
21 that that would resolve most of those issues?

22 MR. WOOD: Those are the primary prejudices --

23 THE COURT: It seems to me that those arguments that
24 Mr. Webb has made and Mr. Madigan made apply to all the
25 defendants, individual defendants in this case.

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1 MR. WOOD: I suspect that's probably right, Your Honor.
2 And without --

3 THE COURT: I guess the point is that you're really
4 stuck in a difficult situation. Here, Mr. Webb talks about
5 Hobson's choices as to his client. You've got the ultimate
6 Hobson's choice because you're essentially here asking for me to
7 give an indefinite stay for a client who is a fugitive.

8 MR. WOOD: I don't think it's indefinite, Your Honor.

9 THE COURT: Well, give me a timeframe.

10 MR. WOOD: If there were a definite period, 60, 90, 120
11 days to come back and report --

12 THE COURT: How do I know that your client is going to
13 get religion with respect to the importance of the federal
14 criminal process in sixty days or ninety days?

15 MR. WOOD: I don't think anybody can predict what his
16 individual decisions would be or what his status with the marshal
17 service --

18 THE COURT: Well, is this Court supposed to be captive
19 to that?

20 MR. WOOD: Well, without disputing his decisions in the
21 California case, Your Honor, at a minimum it compounds the
22 incrimination problem and only heightens his Fifth Amendment
23 problem here.

24 THE COURT: It's even a greater challenge as to his
25 lawyers I suspect.

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1 MR. WOOD: I think they do, Your Honor. I think that
2 that is -- if those were admitted, there would be no prejudice
3 here on the side of the defendant.

4 THE COURT: All right. Well, thank you, Mr. Wood.
5 Anything further on this?

6 MR. WOOD: No. Thank you, Your Honor.

7 THE COURT: All right. Thank you very much. Let me
8 hear now if I can from you, Mr. Arenson, or you, Ms. Robbins, in
9 terms of on the issue of the stay. Let me just quickly if I can,
10 Mr. Arenson, I don't want to cut you off. Certainly, I want you
11 to address the arguments that you want to present to the Court.
12 But with respect to the matter of an adverse inference, it seems
13 to me a quick resolution of this from the point of view of an
14 effort to stay as I've read your papers in terms of the public
15 interest involved here. You've already had the chief judge of
16 this court determine there's a likelihood of success on the
17 merits with respect to the granting of the temporary restraining
18 order and ten days later, I essentially reached the same
19 conclusion granting a preliminary injunction. And you clearly
20 noted the irreparable harm to the community at large in terms of
21 the allegation here. But in terms of the matter of the adverse
22 inference, clearly, there is case law that would support a ruling
23 on a motion in limine not to permit reference to one's assertion
24 of a Fifth Amendment privilege. Isn't that correct?

25 MR. ARENSEN: Your Honor, let me actually take issue

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1 with that point.

2 THE COURT: Because I want you to address that because
3 quite frankly, there are cases, Mr. Arenson in which the
4 government yields on that issue because the government feels it's
5 got a strong enough case, it doesn't even need to introduce that.

6 MR. ARENSEN: Your Honor, we have as you've seen
7 overwhelming evidence that these defendants were thoroughly
8 involved in every aspect of this gigantic fraud --

9 THE COURT: And if that's the case, aren't there cases
10 which clearly indicate that in this kind of posture, courts have
11 ruled that in balancing the need for the evidence and under Rule
12 403 and the matter of prejudice and accumulation of evidence,
13 that there are -- courts have cut right through this and said
14 fine, there's not going to be any reference to an assertion of a
15 Fifth Amendment privilege and allowed the case to move on. Isn't
16 that a fact?

17 MR. ARENSEN: Your Honor, in this case that would be
18 unfair to the FTC --

19 THE COURT: All right. Well, I'll be glad to hear from
20 you on that.

21 MR. ARENSEN: -- to allow the defendants to use the
22 Fifth Amendment as both a sword and a shield. It would
23 effectively refuse to participate in discovery and at the same
24 time refuse to accept the adverse inference resulting from their
25 Fifth Amendment invocation.

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1 of cases stacked up here and I read through a lot of them. Which
2 case did you just cite?

3 MR. ARENSEN: That's the Brown case, Your Honor, from
4 the Central District of California.

5 THE COURT: What is the citation on it? You can just
6 give me the cite.

7 MR. ARENSEN: IBM v. Brown, Your Honor. 857 F.Sup. 13

8 --

9 THE COURT: F.Sup. 2nd. or F. Sup.?

10 MR. ARENSEN: F. Sup.

11 THE COURT: All right. 857 F.Sup.

12 MR. ARENSEN: 1384.

13 THE COURT: 1384.

14 MR. ARENSEN: Central District of California, 1994.

15 Quoting the Supreme Court in Standard Sanitary Manufacturing v.
16 United States.

17 THE COURT: All right. Go ahead.

18 MR. ARENSEN: And, Your Honor, I'd like to stress
19 that's one of many cases that have reached this same conclusion.

20 That asserting the Fifth Amendment in a civil case comes at a
21 cost. And if these defendants elect to do that, they have to pay
22 that price, Your Honor. Now we've heard a lot today --

23 THE COURT: Do they pay the price in the criminal case?

24 MR. ARENSEN: They do not, Your Honor. They've
25 asserted their Fifth Amendment right. It absolutely does not

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1 THE COURT: Well, it remains to be seen if they're
2 going to be permitted to refuse to engage in discovery. That's
3 something we'll have to address here today.

4 MR. ARENSEN: Your Honor, by invoking the Fifth
5 Amendment and refusing to testify in a deposition, refusing to
6 respond to interrogatories and document requests by asserting the
7 Fifth Amendment, they will effectively stonewall us in learning
8 anything about the details of the nature of this fraud, the huge
9 number of consumer victims and our efforts to redress those
10 consumers that have been harmed by the defendants' conduct. Your
11 Honor, we cited in our papers the Brown case, which nicely
12 summarizes the law on this point. And I'm going to quote just a
13 paragraph briefly from that case which summarizes cases from
14 across the country. "The contention of being forced to choose
15 between the compulsion to testify in a civil suit in order to
16 avoid an adverse result on the merits undermines the right to
17 remain silent in a criminal matter while having served its appeal
18 will not stand analysis. While this choice between testifying or
19 invoking the Fifth Amendment may be difficult, it does not create
20 the basis for a stay." And, Your Honor, that case cites cases
21 from across the country that have reached this same conclusion.
22 This as I remind, Your Honor, is a civil case. If the defendants
23 choose to take the Fifth Amendment in this civil case, there
24 are --

25 THE COURT: The case you just read from, I've got tons

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1 prejudice them whatsoever in any future and let's stress that
2 there is no criminal case at this point that anyone here --

3 THE COURT: Well, do you concur that there probably is
4 going to be a criminal case?

5 MR. ARENSEN: Your Honor, I think it's just fair to say
6 that based on the representations from counsel, I have not heard
7 them, but based on the representations from counsel, it appears
8 that it is likely if what they tell me is true that there will be
9 a criminal case here against some or all of these defendants.
10 But we cannot know that at this point, Your Honor, and this case
11 illustrates exactly why pre-indictment stays are such a bad idea.
12 They originally approached this Court and said they had a
13 conversation with the U.S. Attorney back in September of 2008 and
14 in that conversation, the U.S. Attorney told them that
15 indictments are imminent. They then file papers with this Court,
16 explain to the Court that these indictments are imminent, this
17 Court should immediately stay this case. It's now nine months
18 later, Your Honor, and there's been no indictment. And we have
19 no one to tell you when that indictment will ever occur if it
20 does occur. That's the reason courts routinely reject
21 pre-indictment stay requests because no one can determine when
22 the indictment will be issued or if it will indeed be issued and
23 that's certainly the case here, Your Honor. Nine months since
24 the imminent indictment that we've heard about and no indictment.

25 THE COURT: Let me ask you this, Mr. Arenson. What if

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1 the Court determined that the matter of the adverse inference or
2 the admissibility of that would be a matter that would be left
3 open to question depending upon how this case plays out?

4 MR. ARENSON: Your Honor, let me answer that this way.
5 The FTC strongly wishes to proceed here.

6 THE COURT: I understand. Let's just say that I deny
7 the motion to stay, that I let this case proceed for the reasons
8 you've noted. But with respect to the assertion of the Fifth
9 Amendment when we get there in terms of as to what the defendants
10 can and cannot assert as to a Fifth Amendment privilege, it
11 remains open as to whether or not I'm going to permit that to be
12 admissible in a civil action depending upon how the case plays
13 out. It may or may not -- the Court may balance the factors
14 under Rule 403 and make a determination that it may or may not be
15 admissible.

16 MR. ARENSON: Your Honor, that would certainly be
17 within the Court's discretion. I can answer that that way. My
18 concern, of course, is that we seek to depose the defendants and
19 they erect the Fifth Amendment barrier to every question we ask
20 which I fully expect given the amount of culpable conduct here.
21 And then the FTC is in the position of not being able to locate
22 consumers who have been harmed by this conduct, locate the
23 software that has harmed the consumers involved in this conduct.
24 And, Your Honor, one point that I want to make sure I make before
25 I sit down on this. This 1,000 complaints issue is a complete

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1 got out of this fraudulent scheme. So that's an important point,
2 Your Honor.

3 A couple of other small points. Counsel has alleged
4 that Marc D'Souza was not served prior to the preliminary
5 injunction. I believe that is incorrect. In fact Marc D'Souza
6 was served in Canada with our pleadings. Counsel made the
7 strategic decision whoever counsel was at the time not to appear
8 before this court. The same is certainly true with Mr. Jain. I
9 had a long conversation with Mr. Jain's attorney encouraging
10 him --

11 THE COURT: Mr. Jain has acknowledged the jurisdiction
12 of this Court. Correct, Mr. Wood?

13 MR. WOOD: That's right, Your Honor.

14 THE COURT: And so has Ms. Ross. Correct, Mr. Webb?

15 MR. WEBB: I have.

16 THE COURT: And Marc D'Souza has not yet and I have to
17 address a motion to dismiss filed by Mr. Madigan as to that.

18 MR. ARENSON: At least Maurice D'Souza, Your Honor.

19 THE COURT: I'm going to get to that, the matter of the
20 jurisdiction later on.

21 MR. ARENSON: Marc D'Souza actually has submitted to
22 the jurisdiction of the Court. His father, Maurice has
23 challenged it.

24 MR. MADIGAN: That's right, Your Honor. We have.

25 THE COURT: Oh, you have. I'm sorry. You've moved to

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1 red herring and I want to explain why. Even in traditional
2 telemarketing fraud cases that the FTC sees, there are a small
3 fraction of complaints --

4 THE COURT: I recognize that, Mr. Arenson. You don't
5 have to even explore that. There's no question. The fact that
6 there are a thousand complaints is very telling to this Court in
7 terms of the normal ripple effect without question.

8 MR. ARENSON: By FTC standards, it is a huge,
9 absolutely --

10 THE COURT: I recognize that.

11 MR. ARENSON: -- gigantic number. The other issue that
12 was raised was the amount of injury here and the FTC continues to
13 pull numbers out of thin air, I want to address that allegation
14 because it simply isn't true. Defendant Sam Jain in the Canadian
15 proceeding which defendants have referenced attaches a profit and
16 loss statement to his own affidavit in which he explains exactly
17 how much money Innovative Marketing makes. And according to that
18 profit and loss statement, in the year 2006 alone, Innovative
19 Marketing made \$57 million. In 2005, the total was 24 million.
20 In 2004, it was \$10.5 million. These are huge numbers, Your
21 Honor, and that doesn't even conclude 2007 and 2008 in which
22 these defendants were very, very active. So when Marc D'Souza
23 says that our complaint addresses conduct post 2006 only, that's
24 simply wrong, Your Honor. We're looking at more than \$92 million
25 in injury prior to December of 2006 when Marc D'Souza allegedly

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1 dismiss. That's right. But you haven't challenged -- so there's
2 no question of the jurisdiction of this Court here including --
3 and how about the father, Maurice D'Souza, Mr. Rasmussen?

4 MR. RASMUSSEN: The father who is the relief defendant
5 is the only one asserting a jurisdictional --

6 THE COURT: Okay. Thank you. Thank you very much.
7 Thank you.

8 MR. ARENSON: Your Honor, a couple more notes. The
9 defendants rely heavily over and over again on this FTC v.
10 Healthsouth case and Your Honor, I would encourage you to take a
11 close look at this case because it could not be more unlike the
12 facts here. In Healthsouth, the FTC essentially took a guilty
13 plea from a defendant and turned it into a complaint, typos and
14 all and submitted it to a court. The court found that the FTC
15 had not conducted its own independent investigation unlike the
16 case here involving an FTC investigation of more than a year. At
17 that point, the Department of Justice intervened in the case
18 because it did not want the FTC releasing its evidence to the
19 defendant. And in fact, the government in that case requested
20 the stay. Not only that, Your Honor, but the FTC refused to turn
21 over to the defendants the evidence that they were going to use
22 in the case against the defendants because D.O.J. wouldn't let
23 them. Now under those circumstances, the court said enough. A
24 stay is appropriate here.

25 THE COURT: I think also in that case as I recall, I've

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1 got to read through this again, as I recall, if I'm not mistaken,
2 Judge Johnson in that case also made a finding that the
3 government had manipulated the process somewhere in these facts.

4 MR. ARENSON: Absolutely, Your Honor.

5 THE COURT: I have to look through it again. But I
6 seem to recall he made a finding that the government had
7 manipulated the process.

8 MR. ARENSON: Absolutely right, Your Honor. And there
9 is absolutely nothing before this Court that would indicate any
10 type of activity here. Although defense counsel have made
11 completely unsubstantiated accusations that the FTC is somehow
12 behaving improperly here, they have absolutely nothing to back
13 that up. And I want to address the accusation aimed specifically
14 at me that I did not inform this Court of the criminal proceeding
15 which is absolutely false. What I told the Court at the
16 preliminary injunction hearing is that a search warrant had been
17 executed at their U.S. headquarters --

18 THE COURT: You don't need to address that, Mr.
19 Arenson. I was very comfortable with the fact, I had no doubt
20 that there was going to be a criminal proceeding in this case.

21 MR. ARENSON: Very good, Your Honor.

22 THE COURT: It was perfectly obvious to me that there
23 was going to be a criminal proceeding and you in fact even
24 referenced a search warrant. That's fine. I was comfortable
25 with that. You don't need to worry about that.

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1 Court determines that you don't need to have the evidence of
2 someone asserting their Fifth Amendment privilege and it's not
3 going to be admissible against a defendant and if the Court makes
4 that determination, it seems like a lot of things are cut right
5 to the core in terms of trashing through this because, you know,
6 obviously from your point of view, the government is worried for
7 I guess right now until Mr. Sam Jain decides he wants to appear
8 somewhere, the government faces the danger of an indefinite stay
9 of proceedings which would really be a nightmarish prospect for
10 the Federal Trade Commission.

11 MR. ARENSON: And, Your Honor, not just for the Federal
12 Trade Commission, but for the consumers that have been injured
13 here --

14 THE COURT: I understand.

15 MR. ARENSON: We're talking about probably more than a
16 million consumers that have been victimized here and the prospect
17 of not seeing any type of redress for an indefinite period while
18 Sam Jain runs from the U.S. Marshal Service does not seem to be
19 an accurate balance of the harm here.

20 THE COURT: All right. So your point of view on the
21 Fifth Amendment and we're going to get to this in more detail
22 later is is that and the matter of the assertion must bear the
23 analysis of whether or not you're asking for items in the context
24 of just being a corporate representative as opposed to individual
25 questions.

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1 MR. ARENSON: Very good, Your Honor.

2 THE COURT: Let me just address the matter on the --
3 we're going to get to the matter of the assertion of the Fifth
4 Amendment privilege probably in the context of the motion to
5 modify the preliminary injunction. But the government isn't
6 disputing that these defendants have a right to assert an
7 individual Fifth Amendment privilege, are you, Mr. Arenson?

8 MR. ARENSON: Absolutely not, Your Honor. Of course,
9 they do.

10 THE COURT: The only question is is that what adverse
11 inference can be drawn from it and whether or not the Court would
12 permit any evidence as to an adverse inference being drawn in
13 this case.

14 MR. ARENSON: That is one issue, Your Honor.

15 THE COURT: And that's an issue that you may have to
16 address. Quite frankly, I certainly recognize that government
17 counsel always want to make sure they put in every item of
18 evidence to meet their perception of burden. But sometimes these
19 battles are really unnecessary battles because the evidence
20 really isn't necessary. And so when you note the great public
21 concern and the number of consumers, if we're just going to get
22 tied up over whether or not, if you have the strength of the case
23 that Chief Judge Legg found that you had and I've already made a
24 finding you have in terms of likelihood of success on the merits,
25 it may well be that in the balancing of the equities here, the

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1 MR. ARENSON: Your Honor, we have never disputed that
2 the defendants are entitled to assert the Fifth Amendment in
3 individual capacity. There's one important point before I sit
4 down, Your Honor, and that's this corporate issue which the
5 defendants have, their counsel have testified that these
6 defendants are no longer involved with Innovative Marketing.
7 Absolutely zero evidence.

8 THE COURT: They haven't testified. They have
9 proffered.

10 MR. ARENSON: They have proffered without any support,
11 Your Honor. No evidence before this Court that these defendants
12 have ceased their relationship, an admitted relationship with
13 Innovative Marketing. And in fact the only evidence in the
14 record is the FTC's evidence in which as of May 2008, months
15 before we filed our case, both Sam Jain and Kristy Ross were
16 engaging in Internet chats back and forth directing Innovative
17 Marketing activities and Sam Jain was living in a condominium in
18 San Francisco with a lease that indicated it was Sam Jain on
19 behalf of Innovative Marketing. Again the only evidence before
20 this Court is that these defendants continued to be associated
21 with Innovative Marketing and as such, they should be required to
22 take actions on behalf --

23 THE COURT: I gather the corporation was paying the
24 rent on his apartment in San Francisco. Is that right?

25 MR. ARENSON: Your Honor, exactly right, Your Honor,

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1 and it's certainly an odd situation if indeed the story counsel
2 tells is true that these defendants have washed their hands of
3 Innovative Marketing. That the corporation continues to pay his
4 rent.

5 THE COURT: All right. I understand. Thank you very
6 much, Mr. Arenson. Just addressing in terms of rebuttal on the
7 motions of Sam Jain, Kristy Ross and Marc D'Souza, in no
8 particular order, whichever counsel want to address this, Mr.
9 Webb or Mr. Madigan, if you want to take the lead on this, I
10 don't really care. Here's the point on this as I analyze this
11 matter of an adverse interest and the right to assert a Fifth
12 Amendment privilege. It seems to me that as a practical matter,
13 as a practical matter, I could be misreading your argument,
14 Mr. Webb, but I don't understand you to be saying that Kristy
15 Ross can assert her Fifth Amendment privilege to every question
16 she's asked if her deposition is taken. If she's asked were you
17 ever a corporate officer of Innovative Marketing, Incorporated
18 and there are corporate documents that reflect that she was, she
19 doesn't incriminate herself to say yes, I was a corporate officer
20 and if she's asked do you have any corporate records and she says
21 I don't have any corporate records, did you ever have access to
22 any, I did or I didn't, at some point in time I recognize that
23 you in your judgment have to assert a Fifth Amendment privilege
24 if she's asked about individual culpability. But I don't know
25 that there's a blanket, there can be a blanket assertion of a

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1 Fifth Amendment privilege. Now some counsel disagree with that
2 and even state their name that there's a Fifth Amendment
3 privilege. I'm curious as to how you interpret that when you
4 talk about the right to assert the Fifth Amendment privilege.

5 MR. WEBB: I agree with Your Honor. It's under the
6 law, it's my belief that you cannot just take a blanket assertion
7 to anything that could possibly be asked under any circumstance,
8 number one. Number two, the case law seems clear that what is
9 being required has to be testimonial in nature. Okay. That's
10 the second --

11 THE COURT: Crawford v. Washington. Clearly --

12 MR. WEBB: It has to be testimonial in nature and
13 number three, it actually has to be compelled. Okay. So that it
14 depends on the questions and it depends on the circumstance. But
15 you can't just blanket -- and by the way, I can see the seeds of
16 a resolution here if we could -- if the government feels so
17 strongly about this case which they said they do and they've got
18 all this evidence and they want to go forward, if, if there could
19 be an understanding that they don't need and won't offer into
20 evidence the invocation of the Fifth, that would then mean that
21 we -- that takes away the adverse inference issue that we've been
22 talking about. And when we get to the contempt motion, we got to
23 flesh this out because there's paragraphs in the preliminary
24 injunction that they appear to be saying my client must waive her
25 privilege --

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1 THE COURT: We'll address --

2 MR. WEBB: -- and we'll address that later. So I'm
3 going to leave that behind. If we could get that resolved. What
4 would not be fair to Kristy Ross would be to leave it up in the
5 air because then or let me just, I'm going to quote one case to
6 Your Honor if I might and I'm going to sit down. Okay.

7 THE COURT: That's all right.

8 MR. WEBB: It's the Dresser case which is out of the
9 D.C. Circuit, okay, which is cited in the briefs. But the
10 Dresser case --

11 THE COURT: And that's the case in which certiorari was
12 denied by the Supreme Court.

13 MR. WEBB: That is correct. That's correct. Your
14 Honor is exactly correct. The quote I'm just going to read real
15 carefully here is that what the D.C. Circuit said is the
16 strongest case for deferring civil proceedings is where a party
17 under indictment for a serious offense is required to defend a
18 civil or administrative action involving the same matter because
19 the noncriminal proceeding might undermine the party's Fifth
20 Amendment privilege against self-incrimination and expand rights
21 of criminal discovery. If we got rid of both those problems here
22 which is that the adverse inference will be taken away so that
23 she's not put in that Hobson's choice and she's allowed to just
24 take the Fifth Amendment on things that actually will incriminate
25 her, then that will get rid of the two problems that I've raised

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1 and which means -- so anyway, I'm repeating myself and I don't
2 want to do that. But if we don't get rid of those problems, I
3 strongly believe we're entitled to a stay.

4 THE COURT: All right. Thank you very much. Do you
5 want to add anything on this, Mr. Madigan --

6 MR. MADIGAN: Yes.

7 THE COURT: -- because I want to see if your
8 interpretation of the Fifth Amendment is the same as Mr. Webb's.
9 Your client just is not free to just sit down and say I take the
10 Fifth Amendment, I decline to answer any questions. He can only
11 assert it if it's asked in the context of individual culpability
12 perhaps in terms of what did you say to whom about X. But in
13 terms of an inquiry in terms of Innovative Marketing,
14 Incorporated corporate documents, you know, mailing lists or
15 whatever, where the documents are, it seems to me that as a
16 corporate representative, if he was a corporate representative,
17 he's got to respond to those.

18 MR. MADIGAN: Well, Your Honor is going to find out a
19 lot more about this case if it goes forward. I do agree with
20 counsel with regard to the Fifth Amendment. But there's no big
21 corporation, Innovative Corporation. You have these individuals,
22 my client and the other individuals who had relationships with
23 each other. Innovative is a single --

24 THE COURT: It's alleged that your client was an
25 officer of Innovative Marketing.

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1 MR. MADIGAN: He was not an officer of Innovative --

2 THE COURT: It's alleged that he was.

3 MR. MADIGAN: Well, it may be alleged. The counsel
4 here has stated all kinds of things and I think if Your Honor --

5 THE COURT: But my point is that the government is
6 entitled if the case proceeded forward at a deposition of your
7 client to ask if he was ever an officer of Innovative Marketing.
8 Your client is going to say no, I wasn't. I was never an officer
9 of Innovative Marketing and the government is free to confront
10 him if there is such evidence, saying here's a corporate filing
11 document listing you as an officer. And as to that, I don't
12 think there's a Fifth Amendment privilege there for your client
13 to respond and say well, that's incorrect or it is correct or
14 whatever.

15 MR. MADIGAN: I agree with Mr. Webb with regard to
16 question by question as Your Honor knows from Your Honor's
17 experience. It depends on what the question is, how it's asked
18 and then how it's answered. But I think you're starting to get a
19 flavor for the master of exaggeration over here who continues to
20 throw out these numbers. \$92 million of injury is complete
21 nonsense. And I think where he's going is when he says stonewall
22 us from learning the details of the fraud by taking our clients'
23 depositions. Well, by the way, you're supposed to have evidence
24 of the fraud before you file a case. Not from our clients. Our
25 clients are not obligated to come in and testify in depositions.

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1 modify the preliminary injunction. And then the first section of
2 Marc D'Souza's motion for temporary stay and modification for
3 preliminary injunction, paper number 71, addresses the matter of
4 the motion to stay. This case certainly does raise Fifth
5 Amendment issues with respect to the criminal investigation being
6 conducted by the U.S. Attorney's Office for the Northern District
7 of Illinois and the Court finds it's clearly, it has at least
8 been represented to counsel that there is going to be a criminal
9 indictment handed down by the grand jury and it remains to be
10 seen what the reason is for the delay in that process. Counsel
11 has mentioned the FTC v. Dresser Industries case. I would note
12 that the United States Court of Appeals for the District of
13 Columbia noted in that case that ordinarily the Constitution does
14 not require a stay of civil proceedings pending the outcome of
15 criminal proceedings and that was an en banc decision of the D.C.
16 Circuit and certiorari was denied in that case. In the absence
17 of substantial prejudice to the rights of the parties involved,
18 parallel proceedings are unobjectionable under our jurisprudence.
19 And that's also a quote of the D.C. Circuit Court of Appeals.
20 Obviously, the decision to grant a stay under these circumstances
21 rests within the discretion of this court and the United States
22 Court of Appeals for the Fourth Circuit has specifically noted
23 that subject to an abuse of discretion standard on appeal and
24 that's United States v. Georgia Pacific Corporation, 562 F.2nd.
25 294, a Fourth Circuit opinion, 1977. I'm also guided by one of

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1 They have a Fifth Amendment right with respect to this and as
2 Your Honor will find out, these entities had other business and
3 there's all this reference to this Canadian lawsuit which I won't
4 bore you with at the moment. But there were at least with my
5 client, music websites, career website, travel stuff. There were
6 a lot of activities that generated revenue. And so yes, I agree
7 with my colleague that it's a question by question and if there's
8 no inference, I think Your Honor could tailor something that
9 might work here.

10 THE COURT: All right. Thank you very much. Mr. Wood,
11 do you want to be heard any further on this in terms of a motion
12 for the stay?

13 MR. WOOD: I don't, Your Honor. Thank you.

14 THE COURT: Well, thank you very much. I'm prepared to
15 rule on the motion to stay now as we proceed on on this. With
16 respect to the three motions to stay, Sam Jain's motion to stay,
17 paper number 45, I will just note that Sam Jain is currently a
18 fugitive from the order of the federal court in California and
19 proposes no timeframe with respect to a motion to stay. Kristy
20 Ross -- that's paper number 45. Kristy Ross' motion for a
21 temporary stay, paper number 48, has been crystallized out in
22 terms of the Court's view of the matter of an adverse inference
23 and the matter of the right to assert the Fifth Amendment
24 privilege as to just personal matters that we're going to address
25 and I'm going to address those in the context of the motion to

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1 my predecessors on this court, Judge Young's opinion, In Re:
2 Mid-Atlantic Toyota Antitrust Litigation, 92 Federal Rules
3 Decision 358, opinion in 1981 in which Judge Young addressed the
4 factors being, one, the interest of the plaintiff in proceeding
5 expeditiously with the civil action as balanced against the
6 prejudice to the plaintiff if there is a delay; two, the burden
7 on the defendants; three, the convenience to the courts; four,
8 the interest of persons not parties to the civil litigation and
9 five, the public interest. Here, the factors weigh in favor of
10 denying the motions to stay. But I'm going to make sure I
11 carefully note certain rulings that are almost certainly going to
12 follow particularly with respect to an adverse inference because
13 the simple fact is the chief judge of this district court has
14 determined that there's a likelihood of success on the merits
15 when he granted the temporary restraining order. I've already
16 found that there's a likelihood of success on the merits with
17 respect to my granting of the preliminary injunction. And I'm
18 not going to have this case be held up indefinitely and
19 interwoven with a criminal case in which apparently the lead
20 defendant has decided that he still is not willing to grace his
21 presence in a federal court in this country all over the matter
22 of the government feeling like it has to introduce evidence of
23 assertion of a Fifth Amendment privilege. Without ruling
24 finally, I will say it's almost a given that the government is
25 not going to be able to introduce evidence of the assertion of a

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1 Fifth Amendment privilege in this case. Now there may be some
 2 tweaking of that. But the basis of my ruling and taking away an
 3 issue that Mr. Webb and Mr. Madigan certainly raised were the
 4 matter of an adverse inference and there being evidence that can
 5 be introduced as to an adverse inference. If the government has
 6 the strength of the case that I believe it has, certainly I've
 7 made a finding on that. To put that final nail in the coffin
 8 before a jury in this case at the trial is not necessary and
 9 we're not going to have a whole case be tied up in knots just
 10 over the government's desire to introduce that evidence. So it's
 11 almost certainly there's not going to be an adverse inference
 12 that's going to be drawn. These defendants are entitled to
 13 assert a Fifth Amendment privilege on individual matters and
 14 we'll go over that in a moment.

15 When I weigh the factors noted by Judge Young which is
 16 consistent with the Dresser Industries case and the Fourth
 17 Circuit's standards, it seems clear to me that first, the
 18 interest of the plaintiff as proceeding expeditiously with the
 19 civil action as balanced against the prejudice to the defendants
 20 if there is a delay. Certainly, an indefinite stay would
 21 significantly prejudice the Federal Trade Commission in this case
 22 as the Defendant Sam Jain has essentially rendered the criminal
 23 proceedings potentially indefinite. I suspect that there will be
 24 other motions filed if there is a criminal case in Chicago with
 25 respect to one defendant not being present and counsel for the

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1 Virginia noted in Avalon Bay Communities, Inc. v. San Jose Water
 2 Conservation Corp., an opinion at 2000 Lexus 63773, an opinion on
 3 August 27, 2007. "While the choice between testifying or
 4 invoking the Fifth Amendment may be difficult, it does not create
 5 the basis for a stay. Certainly, defendants have to make
 6 difficult decisions about legal strategy, but a motion to stay is
 7 unwarranted simply because of that choice." And it has been
 8 noted by another district court judge. "Forcing an individual to
 9 list non-criminal disadvantage by remaining silent for fear of
 10 self-incrimination in a parallel criminal proceeding does not
 11 rise to the level of an unconstitutional infringement." Quite
 12 frankly, the Fourth Circuit has clearly ruled previously that a
 13 party seeking a stay must show by clear and convincing evidence
 14 that a party's hardship outweighs the prejudice to the opposing
 15 party and that is Walther v. Armstrong World Industries,
 16 Incorporated, 715 F.2d. 124, a Fourth Circuit opinion in 1983
 17 and that burden has simply not been met.

18 The third of the five factors to analyze is the
 19 convenience to the Court. It's not a factor with me one way or
 20 the other in terms of my convenience or my docket in comparison
 21 with the docket of a federal judge in Chicago in terms of the
 22 priority of the pace of that litigation under the Speedy Trial
 23 Act, although it seems to me these kinds of cases very rarely are
 24 brought to trial within 70 days of the appearance of defendants.
 25 That's really not a factor here.

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1 co-defendants noting the absence of that defendant and that's
 2 another issue of another day in another case for another judge.
 3 But in the Mid-Atlantic Toyota Antitrust Litigation, there was a
 4 denial of a stay where the defendant sought a stay pending
 5 completion of any criminal actions which might arise. The delay
 6 in this case would be significant because memories fade over
 7 time. What my colleague down in Virginia, Judge Ellis, has noted
 8 in the In Re: Phillips, Beckwith and Hall case, 896 F.Supp. 553,
 9 an Eastern District of Virginia case, that a party is not
 10 entitled to delay resolution of a civil action even to
 11 accommodate her Fifth Amendment interest if her adversary's case
 12 will deteriorate as a result of this stay. I sense there's a
 13 real danger of that in this case as to the government. And
 14 moreover, the interest of the Federal Trade Commission in my
 15 opinion are quite strong. The action here seeks to redress
 16 millions of dollars in alleged consumer injury. And the Supreme
 17 Court has long ago recognized that parallel investigations and
 18 enforcement proceedings may be necessary to protect the public
 19 interest and that deferring either proceeding could jeopardize
 20 that interest. That goes back to the Stanford case back in 1912.
 21 The Stanford Sanitary Manufacturing case reiterated in United
 22 States v. Kordell, 397 U.S. 1, a 1970 opinion.

23 The second of the five factors to be analyzed here is
 24 the burden on the defendants. As another colleague of mine here
 25 in the Fourth Circuit, Judge Lee, of the Eastern District of

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1 The fourth and fifth factors are very important to this
 2 Court. That is the interest of persons not parties to this civil
 3 litigation and the public interest is the fifth factor. And the
 4 allegations here are precisely the reason in my opinion that the
 5 Federal Trade Commission was created and the very reason for the
 6 Federal Trade Commission Act with respect to a resolution of the
 7 serious issues in this case with respect to public interest.
 8 Public interest is very much involved here as I have previously
 9 noted back in December in the issuing of the preliminary
 10 injunction. There is enormous public interest involved here in
 11 terms of the allegation and it's significant enough that I'm not
 12 going to have a litigation be stopped just over one over the
 13 potentiality of a criminal investigation although I find it's
 14 probably in light of what I've seen of this case, it's probably
 15 almost certainty that there's going to be a criminal indictment.
 16 But again, as I've said before, Mr. Arenson and Ms. Robbins,
 17 we're not going to have it get tied in knots just over the
 18 government feeling that it's got to introduce evidence that
 19 somebody asserted their Fifth Amendment privilege if there's an
 20 adverse inference to be drawn. So that will wait another day.
 21 But and counsel can get a copy of this transcript when the time
 22 comes on a motion in limine. It is almost an absolute guarantee
 23 to these defendants that we're not going to have an adverse
 24 inference be drawn as to clients that assert an individual
 25 privilege. The question becomes the legitimacy of that assertion

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1 and I sense that I'm going to have to monitor that and make
2 myself available. So that the question becomes the scope of the
3 assertion of the Fifth which we'll address. But for those
4 reasons, as to Sam Jain's motion to stay, he's a fugitive from
5 justice and it has not even been suggested what the time period
6 will be. So for those reasons as set forth on the record, an
7 order will be entered denying the motions to stay as to Sam Jain,
8 paper number 45, Kristy Ross, paper number 48 and Marc D'Souza's
9 motion for temporary stay, which is paper number 71. So that's
10 the Court's ruling on the motions to stay.

11 Moving on here with respect to the contempt motion.
12 There is one motion, the Federal Trade Commission's motion for an
13 order holding Sam Jain and Kristy Ross in contempt of court and
14 requiring the repatriation of their assets, which is paper number
15 49. And I'll be glad to hear from you, Mr. Arenson, on the
16 government's motion. Let me cut to the core of this if I can
17 with respect to an issue that you probably need to address that I
18 noted was addressed by Mr. Luskin, Mr. Woods' partner in
19 representing Sam Jain and that is essentially a phrase that has
20 been raised as to the matter of testimonial compulsion as opposed
21 to document compulsion here. Essentially, the point that's been
22 raised here on the contempt motion, Mr. Arenson, is the matter of
23 the disclosure requirements essentially. The defendants have
24 noted the matter of certain disclosure requirements independent
25 of document production and I think you are going to need to

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1 that's not the purpose of the contempt motion. It's about Kristy
2 Ross and Sam Jain's complete failure to act on the part of the
3 corporation to produce documents. I would cite to the Court the
4 Dunlap case in which the defendant refused to produce documents
5 of the corporation despite the fact that he was in control of the
6 corporation and the Fourth Circuit affirmed the trial court
7 judge's decision to incarcerate the defendant for exactly those
8 actions. That's exactly what we got here, Your Honor. But we've
9 got two officers who refuse to on behalf of the corporation to
10 comply and one officer of the corporation who refuses to even
11 show up, Your Honor, and it's denying the FTC the information
12 that it is entitled to under the preliminary injunction and this
13 is a hugely important issue for the FTC because the FTC needs the
14 records of the corporation to establish consumer injury.

15 THE COURT: Well, isn't the safer process, Mr. Arenson,
16 as we deal with this preliminary injunction which was too broadly
17 worded, to have an understanding since everyone is here now and
18 they've got lawyers here in terms of what is expected and how
19 quickly it's expected and then there may be grounds if someone
20 willfully just refuses to disclose corporate documents. I
21 suspect in light of the bench warrant that's out for Jain in
22 California, it's not particularly a concern.

23 MR. ARENSON: I agree with Your Honor.

24 THE COURT: But in terms of Ms. Ross to hold her in
25 contempt and seek to incarcerate her over issues in terms of the

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1 address this right away in terms of seeking to have me hold Sam
2 Jain or Kristy Ross in contempt. I'll be glad to hear from you.

3 MR. ARENSON: Absolutely, Your Honor. As we pointed
4 out in our pleadings, there are really two issues here and one of
5 them is not individual assertions by the defendants. The FTC
6 does not seek to prevent individual defendants in this case from
7 properly asserting their Fifth Amendment rights as to information
8 tailored toward them. The problem here, Your Honor, is that the
9 defendants are asserting Fifth Amendment rights on behalf of the
10 corporation, Innovative Marketing. These are corporate officers
11 of Innovative Marketing who refuse to force the corporation to
12 comply with this order refusing to turn over corporate records.
13 And Your Honor --

14 THE COURT: Now clearly, there is a definitive decree
15 which I've issued, but it has been noted in the motion to modify
16 the preliminary injunction that there's certain aspects of that
17 decree which essentially would infringe on a number of the
18 defendant's rights and through the advice of counsel, totally
19 apart from Sam Jain's absence, as to Kristy Ross, she has raised
20 those issues. So how does the government propose me to find her
21 in contempt? I find there may be some merit as to her position.

22 MR. ARENSON: Because, Your Honor, she is free to
23 assert her Fifth Amendment privilege as to portions of the
24 preliminary injunction that require her in her individual
25 capacity to produce evidence that would incriminate her. And

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1 breadth of the preliminary injunction --

2 MR. ARENSON: Fair enough, Your Honor.

3 THE COURT: You would agree that it is within this
4 Court's discretion, would you not --

5 MR. ARENSON: Absolutely, it is, Your Honor.

6 THE COURT: -- in terms of what the scope of the
7 production is and what is not and how quickly the discovery is
8 going to proceed in this case and the availability of the court
9 to resolve disputes. It seems to me that's a far safer process
10 than to hold someone in contempt --

11 MR. ARENSON: Your Honor, the FTC has no interest here
12 in seeing people thrown in jail. As to Kristy Ross, there has
13 been absolutely no evidence whatsoever submitted by Kristy Ross,
14 not an affidavit, not a document, not nothing from Kristy Ross
15 indicating when it is that she allegedly washed her hands of this
16 corporation. But that's a hugely important point because that's
17 the same thing that happened in Dunlap. The defendant was
18 ordered to take action on behalf of the corporation and the
19 defendant in that case said you know what, I don't control the
20 corporation anymore, I can't do anything and the court said no,
21 that's not good and you can't just wash your hands of the
22 corporation when you get caught. You have an obligation to take
23 action on behalf of the corporation and --

24 THE COURT: Doesn't it require a factual determination
25 of exactly who controls the accounts for Innovative Marketing and

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1 who's on the accounts, who signs the checks, who authorizes the
2 actions?

3 MR. ARENSEN: I would propose to you what you're
4 raising is the impossibility defense. That defendants cannot
5 comply because they do not have the ability to do so. But as
6 we've briefed in our proceeding, this rests solely with the
7 defendants and not the plaintiff and the defendants are obligated
8 to show to the Court why it is they cannot comply and they have
9 failed to do so. They have introduced no evidence why they can't
10 comply.

11 THE COURT: But it seems to me that we are a tad early
12 here to be holding people in contempt it seems.

13 MR. ARENSEN: Your Honor, I understand where you're
14 coming from. But this is the second time that these defendants
15 have refused to comply. They didn't comply with the T.R.O. This
16 court entered a show cause and at the last minute the defendants
17 appeared. So this would be the second time the defendants are
18 refusing to comply.

19 THE COURT: But this is a little bit premature.

20 MR. ARENSEN: The defendants have certainly had a long
21 time to think about what their obligations are. They've been
22 given the opportunity and they've not done it. We have Internet
23 chats. We got the defendant, Reno, one of the participants in
24 this scheme, talking back and forth with Sam Jain and Kristy Ross
25 about this corporation and its actions. In late May of 2008,

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1 there's an email from an individual to Mr. Jain and to Ms. Ross.
2 They're not emails. They are Internet chats. But essentially
3 the same thing.

4 THE COURT: Well, that may or may not indicate the
5 corporate involvement of Jain or Ross or it may just indicate the
6 belief by someone as to the corporate status of Jain or Ross. It
7 remains to be seen.

8 MR. ARENSEN: Fair enough, Your Honor. But again the
9 burden is on them.

10 THE COURT: All right. I understand. Thank you very
11 much, Mr. Arensen. Counsel, on this, I don't have any intention
12 right now of holding either Mr. Jain or Ms. Ross in contempt. I
13 will deny FTC's motion, which is paper number 49.

14 The third category of the six motions is the
15 motion to strike or in the alternative, motion for extension of
16 time. There's essentially two motions here. There is Kristy
17 Ross' motion to strike or in the alternative, motion for
18 extension of time, paper number 51 and Sam Jain's motion for
19 extension of time, paper number 52. These motions seem to strike
20 the FTC's motion for order holding them in contempt, which is
21 paper number 49 which I have just denied. So it certainly seems
22 to me that papers number 51 and 52 are now moot.

23 MR. WEBB: I'll withdraw 51.

24 MR. WOOD: And I'll withdraw 52.

25 THE COURT: The record will reflect that those motions

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1 are withdrawn and are now moot. We don't need to worry about
2 that topic.

3 MR. ARENSEN: Your Honor, one point of clarification.
4 Is there going to be further guidance from the Court as to what
5 the defendants should do regarding the preliminary injunction?

6 THE COURT: Oh, yeah. We're going to get there. We're
7 about to get to a major category here, Mr. Arensen, on the motion
8 to modify the preliminary injunction. I have for modification of
9 the preliminary injunction one motion, Sam Jain's motion to
10 modify the preliminary injunction, paper number 58. Is there a
11 motion on behalf of Mr. Marc D'Souza, Mr. Madigan?

12 MR. MADIGAN: Yes. It's part of the motion to stay.

13 THE COURT: Right. Paper Number 71 from your client.
14 All right. And that's all part of your motion to stay and it's
15 the second half. All right. All right. Thank you very much.
16 I'm sorry. Thank you, Mr. Madigan. Is there a motion on behalf
17 of Kristy Ross also, Mr. Webb?

18 MR. WEBB: We would like to orally join in the motion,
19 Your Honor, on behalf of Kristy Ross.

20 THE COURT: I'm going to treat it as a joinder as to
21 the defendant, Kristy Ross. That's fine. All right. So I'll be
22 glad to hear from you, Mr. Wood. You take the lead on this.
23 Essentially, you're addressing the preliminary injunction here.
24 Why don't we print out exactly what was filed as a matter of
25 record? I note that you have essentially addressed specifically

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1 certain categories here, Mr. Wood, of the preliminary injunction.

2 All right. You'll need to address defining your client's
3 obligations as an officer of Innovative Marketing, Incorporated
4 as opposed to his response as an individual because it is alleged
5 here that your client was an officer and director of Innovative
6 Marketing, the corporate defendant here. I'll be glad to hear
7 from you.

8 MR. WOOD: Sam Jain was the C.E.O. of Innovating
9 Marketing in February of 2007 according to Canadian affidavit
10 from the Canadian litigation. They've also entered into evidence
11 Internet chats indicating that he was discussing I.M.I.'s
12 business. Those chats are dated March 2008 and May 2008.
13 There's no evidence in the record, Your Honor, that Sam Jain had
14 any connection to I.M.I. whatsoever at the time that the
15 preliminary injunction was entered in December of 2008. And
16 Mr. Arensen speaks about an impossibility defense. It's not an
17 impossibility defense, Your Honor. It relates back to FTC's
18 initial burden of showing that Sam Jain was the control person
19 for I.M.I. on December 12, 2008. And if you look, Your Honor,
20 the impossibility defense applies when the alleged control person
21 was shown to have been bound by the court order at the time that
22 the order was entered.

23 THE COURT: Let me just go over your motion to modify.
24 Section 5, essentially, with respect to financial reporting and
25 accounting. It is further ordered that if they have not done so

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1 already in compliance with the temporary restraining order
 2 previously issued in this matter, each individual defendant, the
 3 relief defendant and each corporate defendant, shall serve upon
 4 counsel for the commission, no later than three business days of
 5 receiving notice of this order, completed financial statements,
 6 verified under oath and accurate as of the date of entry of this
 7 order, on the forms provided as Attachment A for individuals and
 8 Attachment B for businesses to the ex parte temporary restraining
 9 order, signed under penalty of perjury. Certainly that may be
 10 overbroad there in terms of your client's personal Fifth
 11 Amendment privilege and as would be the case perhaps with Ms.
 12 Kristy Ross. But with respect to any corporate capacity or
 13 access to corporate records, where is there an assertion of the
 14 Fifth Amendment Privilege there? He's clearly a corporate
 15 representative of Innovative Marketing and can be required to
 16 complete financial statements.

17 MR. WOOD: Well, Your Honor, in his individual
 18 capacity, I think that the law is very clear on that. The Fourth
 19 Circuit addressed that in the Dunlap case --

20 THE COURT: Can not Sam Jain, an officer and/or
 21 director of Innovative Marketing, be required to prepare
 22 documents with respect to Innovative Marketing, Incorporated?

23 MR. WOOD: Your Honor, the FTC's evidence establishes
 24 at most that Sam Jain had an officer-type relationship with
 25 I.M.I. It does not say that he was a C.E.O.

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1 each individual defendant shall serve upon counsel for the
 2 commission no later than three business days completed financial
 3 statements and I'll hear from the government in a moment, but it
 4 seems to me that language does not need to be modified. There's
 5 really nothing further for me to address as to the language as to
 6 the corporation because there isn't a Fifth Amendment privilege
 7 and I've got information before me indicating that your client is
 8 a corporate officer.

9 The next objection you have is not as to Section 6, but
 10 as to Section Roman Numeral 7(A). Provide the Commission with a
 11 full accounting, verified under oath and accurate of all funds,
 12 documents, and assets outside of the United States which are
 13 titled in the name, individually or jointly of any corporate
 14 defendant, individual defendant or relief defendant. Again, it
 15 seems to me that the same principle applies, Mr. Wood. That as
 16 to the corporate defendant, there is no basis for it. There
 17 should be some modification as to individual defendants.

18 Your next objection was as to Section 12,
 19 identification of affiliates, compelling your clients to prepare
 20 and deliver to the commission a completed statement, verified
 21 under oath identifying by name all of the affiliates that have
 22 worked with the I.M.I. defendants. As to that, it certainly
 23 seems to me that as a representative of the corporate defendant,
 24 that is not overly broad. That as to individual defendants, it
 25 may be overly broad and I'm certainly going to consider modifying

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1 THE COURT: Well, but doesn't his affidavit in and of
 2 itself acknowledge that he performs the function of the CEO,
 3 qualify him as having ability to answer for the corporate
 4 defendant?

5 MR. WOOD: Well, that affidavit is dated February 2007
 6 and as, you know, Your Honor the preliminary injunction was
 7 entered on December the 12, 2008. And so at most, at most that
 8 establishes that Sam Jain was a former officer. It's FTC's
 9 initial burden of showing that he was a control person --

10 THE COURT: They've met their initial burden. You're
 11 asking me to conjecture that he's no longer an officer. And I
 12 have an affidavit that his former function was that of a C.E.O.
 13 in February of 2007. So why shouldn't he be required to respond
 14 to items of corporate financial records? Well, here's the point.
 15 Here's the point. Let me just indicate where I am on this.
 16 There's no evidence from which I could find that he's anything
 17 other than an officer of the corporation. He isn't required to
 18 have a month-by-month update of his status with the corporation.
 19 It's not up to the government to disprove a negative. It's as
 20 simple as that.

21 MR. WOOD: I disagree, Your Honor.

22 THE COURT: I'm sure you disagree. But that's my
 23 ruling. I don't see any need to modify Section 5 as to your
 24 client. I'm going to note that with respect to a motion to
 25 modify, that essentially it seems to me that the language that

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1 the injunction. Anything further you want to be heard on this
 2 point?

3 MR. WOOD: I would only say, Your Honor, that there was
 4 some effort by the FTC to preclude the assertion of individual
 5 Fifth Amendment privilege with respect to each of these.

6 THE COURT: I'm just trying to go line by line.
 7 Section 13, we have the same issue here in terms of
 8 identification of products and websites. Someone is going to
 9 have to respond on behalf of Innovative Marketing, Incorporated.
 10 But again it's the same analysis under Section 13, is it not,
 11 Mr. Wood?

12 MR. WOOD: Same analysis.

13 THE COURT: All right. Okay. The same analysis is
 14 applying here through these sections you've raised. In terms of
 15 14(A) and 14(B) and then Section 15, all the same arguments
 16 apply. All right. Unless there's anything further on that, let
 17 me hear from Mr. Webb or Mr. Madigan. And then I'm going to
 18 address here in terms of whether there's some overbreadth in some
 19 of this language. So thank you very much, Mr. Wood. Mr. Webb,
 20 anything further on this?

21 MR. WEBB: Very quickly, Your Honor. My only point for
 22 Kristy Ross is that if you go through those same paragraphs you
 23 just mentioned, just the same ones, those paragraphs, the only
 24 modification I'm asking for Kristy Ross, you know, Your Honor,
 25 she was involved in marketing and sales for this company. That's

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1 what she did. She didn't run this company. She didn't control
 2 the company. They got to show that before Kristy Ross is ordered
 3 to do something that she can't possibly do. The case law is very
 4 clear. You are not supposed to order someone be in contempt if
 5 the fact is they don't have the ability to comply with the order.
 6 So that's all I'll say is we need to modify this so that it's
 7 clear that whoever is being asked to respond has to have the
 8 control and the authority to answer on behalf of the corporation.
 9 That's all.

10 THE COURT: It doesn't require me to change all the
 11 language. Just with respect to individual defendants being
 12 compelled to do certain things.

13 MR. WEBB: That's correct. I just want to make clear
 14 only that someone who is not a control person who does not have
 15 the authority can't be ordered to do it. That's all I'm asking.

16 THE COURT: All right. Thank you, Mr. Webb. Mr.
 17 Madigan, anything further on this?

18 MR. MADIGAN: Briefly, Your Honor. I'd just join with
 19 my co-counsel with respect to the individual Fifth Amendment
 20 rights. I do want to talk whenever Your Honor wants to hear
 21 about modifying the freeze.

22 THE COURT: I'm going to get to that in a minute. All
 23 right. Mr. Arenson or Ms. Robbins, I'll hear you on this.

24 MS. ROBBINS: Thank you very much. Your Honor, I'd
 25 like to just point out to the Court that in terms of the

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1 financial statements, those individual financial statements not
 2 every single question --

3 THE COURT: Let me address that if I can. With respect
 4 to the individual financial statement, not corporate statements,
 5 individual financial statement, hypothetically, if an individual
 6 has \$6 million parked in a Swiss bank account which are not as
 7 anonymous or are not going to be much longer, is that not an
 8 element of incrimination perhaps to a defendant who is asked to
 9 provide discovery information?

10 MS. ROBBINS: It may be a point that there are
 11 questions on that financial statement.

12 THE COURT: I know. But my point is that in terms of
 13 trying to comply with this order, right, there may be clearly
 14 items that are compelled. And your point is that they can just
 15 assert the privilege as to each item.

16 MS. ROBBINS: And that's what the cases have said.
 17 That you cannot make a blanket assertion. In that document, that
 18 financial document that's attached to the preliminary injunction
 19 that was attached to the T.R.O., not every single one of those
 20 questions the defendants are going to be able to assert their
 21 Fifth Amendment. They should have to assert their Fifth
 22 Amendment privilege to do so.

23 THE COURT: Do you have one of those forms with you?

24 MS. ROBBINS: Yes, Your Honor.

25 THE COURT: It might be helpful if we have identified

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1 corporate control and corporate status of each of these
 2 individuals, Kristy Ross in the Canadian pleadings talks about
 3 there's evidence that she was actually the V.P. That she took
 4 over for Daniel Sundin. The pleadings also said she was the
 5 Director of Sales and Marketing. So there is evidence that she
 6 is a control person in this corporation. In addition, as the
 7 Court has noted, Jain was the acting C.E.O. In terms of the
 8 Court's issue about modifying this order --

9 THE COURT: The specific language here, Section 5, if
 10 they have not done so already in compliance with the temporary
 11 restraining order previously issued in this matter, each
 12 individual defendant, the relief defendant and each corporate
 13 defendant shall serve upon counsel for the commission no later
 14 than three business days of receiving notice of this order,
 15 completed financial statements, verified under oath and accurate
 16 as of the date of entry of this order.

17 MS. ROBBINS: The defendants are free to assert their
 18 Fifth Amendment privilege and it's not the Court compelling them
 19 to do so. It's their right to assert the Fifth Amendment
 20 privilege and it's not the Court should just strike these
 21 provisions or strike that language. It's the defendant's right
 22 to assert that Fifth Amendment privilege and under the case law,
 23 they must do so. And it can't be a blanket assertion and in
 24 those financial statements not every single question is going to
 25 lend itself to a Fifth Amendment privilege. And so those

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1 which questions may not be covered by Fifth Amendment privilege.

2 MS. ROBBINS: Yes, Your Honor. Your Honor, I also want
 3 to point out that in light of the fact that the Court has already
 4 indicated that it may not issue an adverse inference for invoking
 5 the Fifth, that gives us, you know, even more reason to not
 6 strike that provision, but allow the defendants to answer it and
 7 assert their Fifth Amendment privilege since there is not going
 8 to be that danger of the adverse inference.

9 THE COURT: So your point is as to all of these
 10 sections, none of them should be modified.

11 MS. ROBBINS: Absolutely.

12 THE COURT: That an individual defendant may have to
 13 respond to some financial inquiry and that there's no reason to
 14 modify it per se.

15 MS. ROBBINS: Absolutely.

16 THE COURT: All right. Well, thank you very much, Ms.
 17 Robbins. We'll address the freeze motion in a moment. Let me
 18 hear from you, Mr. Wood or Mr. Webb or Mr. Madigan, whoever wants
 19 to go on this. Is it your view that any information on a
 20 financial statement that your client can claim a Fifth Amendment
 21 privilege on this, Mr. Wood?

22 MR. WOOD: Well, Your Honor, in FTC v. FEMA, the case,
 23 1981, out of the Northern District of California, the court there
 24 did determine that the entire form violated the Fifth Amendment
 25 and they struck the entire form out of the preliminary

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1 injunction.

2 THE COURT: On what basis? On the Fifth Amendment
3 basis?

4 MR. WOOD: On the Fifth Amendment basis, Your Honor.

5 THE COURT: Any other cases other than California in
6 1981?

7 MR. WOOD: That's the only case that I have, Your
8 Honor, and I would only add and we raised this in our pleading
9 that the certification on the end of the form recognizes that all
10 of the evidence is produced and all of the information is given.
11 The FTC has said that they would allow a modification to the
12 certification. But I don't think they can make that
13 representation on behalf of someone looking at that for a --

14 THE COURT: So your view is is that your client cannot
15 be required to fill out any financial form of any kind at all on
16 an individual basis?

17 MR. WOOD: Well, in this case, Your Honor, where
18 they're alleging a massive financial fraud, I think that the
19 overwhelming majority and I think even the FTC recognizes in the
20 pleading that they've referenced that the overwhelming majority
21 of these questions do in fact implicate the Fifth Amendment and
22 only a very small number don't.

23 THE COURT: Actually, that's a good point, Mr. Wood.
24 One second. Ms. Robbins, if I can ask you one question?

25 MS. ROBBINS: Sure.

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1 may be entitled to do, but then to turn around and say well, but
2 there's an unfair freezing of the assets. So it's a two-edged
3 sword as to both sides unless I misinterpreted or reading into
4 something. It seems to me as I read through the papers here that
5 there's a two-edged sword as to both.

6 MS. ROBBINS: Right.

7 THE COURT: Now you benefit from that side of the sword
8 as to the matter of the freezing of financial assets. So I'm not
9 sure if it helps you in terms of the nature of the assertion of a
10 privilege because they're essentially arguing that anything they
11 fill out has a Fifth Amendment aspect to it.

12 MS. ROBBINS: And I think that's true. But I think
13 that the argument still stands that the defendants, that there's
14 really no basis to completely strike those provisions. That the
15 defendants can assert on a question-by-question basis. But that
16 the asset freeze argument is separate. And I think I mean the
17 one thing though that in the Butler case which is in the Fourth
18 Circuit where the Court said, you know, the defendants can't
19 assert an inability to comply with the Court's order based on
20 Fifth Amendment and refuse to answer further questions on that by
21 invoking the Fifth Amendment. I mean they can't refuse and not
22 comply at the same time. I mean and I think -- I don't know that
23 --

24 THE COURT: So your point just is basically there's no
25 reason to change the language here. It's just a matter of how --

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1 THE COURT: Given that we're about to get to a topic
2 that I know defense counsel have a very keen interest in and that
3 is the matter of the freezing of assets and the government's
4 position with respect to freezing of all assets in terms of
5 ill-gotten gains as well as the need for financial remuneration
6 to the members of the public, the validity of that argument
7 perhaps in the context of opposing any lifting of the freeze
8 order which certainly seems to me cut the other way in terms of
9 providing some basis for a defendant on an individual basis not
10 providing any financial information other than what's already
11 known to the government because the government has taken the
12 position that all of this may be reflective of ill-gotten gains
13 and essentially, the government's position in a nutshell as I
14 interpret your papers is that it's not up to the government to
15 have to prove each and every item in terms of where the money
16 came from. You're alleging a massive fraud here and, you know,
17 huge bank accounts and people that have put money away and it
18 seems to me that the issue becomes, the very thrust of that
19 argument it seems, the flip of it is is that there may be some
20 Fifth Amendment privilege. I noted when I was reading through
21 these papers that the flip as to the defendants is that to the
22 extent that they allege there's a Fifth Amendment privilege as to
23 these counts, the flip is it also weakens their argument that
24 there shouldn't be any freeze issued because they're asserting a
25 Fifth Amendment privilege as to all of these accounts which they

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1 MS. ROBBINS: Right. Absolutely.

2 THE COURT: All right. Thank you. Go ahead, Mr. Wood.
3 I didn't mean to interrupt your argument, but I wanted to get the
4 thrust of the government there. You recognize that to the extent
5 that your client asserts the total Fifth Amendment privilege as
6 to a financial document, it also I think falls over into the area
7 of freezing of assets.

8 MR. WOOD: I don't have much to add to that, Your
9 Honor.

10 THE COURT: All right.

11 MR. WOOD: The only thing that I would add is that
12 Mr. Jain given his unique circumstance probably has some Fifth
13 Amendment objections to this form that other defendants might not
14 have.

15 THE COURT: All right. Mr. Webb, let me hear from you
16 on this if I can.

17 MR. WEBB: Your Honor --

18 THE COURT: Do you think there's really a need to
19 change the language? It's just a matter of how your client
20 responds to it. Your client is entitled to it as I've indicated.

21 MR. WEBB: Kristy Ross will respond to this
22 questionnaire. She'll take the fifth on questions that she has a
23 bonafide right to take the Fifth on and if she doesn't have a
24 right to take the Fifth, she'll answer. She's going to do it
25 because it should not affect the freeze order.

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1 THE COURT: I'll get to that in a moment.

2 MR. WEBB: She's got no money to pay lawyers right now.

3 THE COURT: I'll get to that in a moment. But the
4 point is that you have nothing further to add about my needing to
5 strike language or change language here.

6 MR. WEBB: On paragraph 5, no.

7 THE COURT: On any of these paragraphs because it's the
8 same issue that was woven through all of them I think.

9 MR. WEBB: I told you my only question is the factual
10 issue about whether Kristy Ross has any ability --

11 THE COURT: I understand. I understand. All right.
12 Mr. Madigan, do you want to be heard further on this?

13 MR. MADIGAN: No, Your Honor. I agree with Mr. Webb.
14 As long as the personal Fifth Amendment is preserved and there
15 will be and is a distinct disagreement about whether somebody is
16 a corporate officer or more importantly with my client who left
17 in '06 which is undisputed by the FTC and the preliminary
18 injunction is issued in '08. That certainly was not at that time
19 in any way associated with the so-called corporation.

20 THE COURT: All right. That's fine. And to the extent
21 that your client says I don't have any access to information, I
22 can't respond to it, I don't know is fine and it may be that
23 ultimately at the deposition of your client that your client is
24 asked in deposition questions about the corporate structure and
25 who had access to the accounts, who had signature authority. As

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1 considers that nexus essential to the Court's authority to enter
2 a preliminary injunction freezing assets. And without evidence
3 of any such nexus, the FTC simply refers to Jain's frozen assets
4 as his ill-gotten gains and were the freeze limited to ill-gotten
5 gains, Your Honor, Mr. Jain would not be seeking modification,
6 but the freeze currently is not so limited. The FTC has not only
7 failed to establish a nexus between the assets frozen in the
8 alleged fraud, but it's failed to provide any non-speculative
9 measure of redressable consumer injury here to which frozen
10 assets could be applied. Even if the FTC is not obligated to
11 trace every dollar of funds frozen to specific fraud proceeds, it
12 nevertheless must establish that the total amount frozen
13 reasonably approximates the amount of redressable consumer
14 injury. Now the FTC's supposed \$100 million consumer injury
15 here, Your Honor, consists of nothing more than a 2004 through
16 2006 total corporate sales figure with an additional 25 million
17 arbitrarily tacked on for calendar years 2007, 2008 with no
18 evidentiary basis whatsoever and there's no attempt to correlate
19 that figure, the hundred million dollars or the \$74 million
20 figure to a nexus to fraud, to specific products or even to any
21 individual defendant. And moreover, as was mentioned earlier,
22 that \$74 million figure disclosed the Canadian litigation
23 specifically included sales transactions with no connection
24 whatsoever to the United States and are left outside the FTC's
25 jurisdiction and beyond the scope of equitable relief in this

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1 to that, he can be asked in his former capacity as a corporate
2 official what knowledge he has at that time in his corporate
3 status. But again that doesn't I think go into the Fifth
4 Amendment and it's just a matter of if it's a Fifth Amendment
5 issue on a personal basis, you can assert it at that time and
6 I'll certainly make myself available if necessary to weave
7 through these Fifth Amendment issues individual as opposed to
8 current and or past corporate executives and the questions that
9 are asked. So it seems to me that as to the matter of the motion
10 to modify the preliminary injunction as to the striking of
11 provisions of the preliminary injunction, there's no need for
12 that and I'm going to address this entire motion in a moment.

13 Now the motion to modify the asset freeze because of
14 Sixth Amendment right to counsel, I'll be certainly glad to hear
15 from you, Mr. Wood, and then from Mr. Webb and Mr. Madigan. So
16 Mr. Wood, if you would like to address the Court on that, please?

17 MR. WOOD: Thank you, Your Honor. The total asset
18 freeze in Section 4 of the P.I. is overbroad here because the FTC
19 has not established any nexus to the alleged fraud or to
20 redressable consumer injuries. Because this is not a forfeiture
21 action unlike the cases cited by the FTC in their briefs in which
22 forfeiture statutes vest title to forfeitable assets in the
23 government as of the time of illegal conduct, the FTC must
24 establish a nexus here between the assets frozen and the ultimate
25 relief available if it succeeds on its claim. The Fourth Circuit

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1 action. Now the FTC's jurisdiction to provide restitution to
2 foreign consumers exists, but it's limited only to transactions
3 that either cause or are likely to cause reasonably foreseeable
4 injury within the United States or involve material conduct
5 occurring within the United States. That cannot apply to foreign
6 consumers engaged in foreign transactions with a Belizean company
7 based in the Ukraine particularly when those transactions are
8 perfectly legal in the foreign jurisdictions in which they're
9 consummated. By freezing all existing assets without any nexus
10 to the alleged fraud or to an amount of redressable consumer
11 injury, the asset freeze is not only overbroad, but it violates
12 the individual defendants' Sixth Amendment right to retain their
13 chosen counsel. Without that nexus, Your Honor, the freeze
14 breaks the rule that a criminal defendant's constitutional right
15 to counsel is simply more important than the government's
16 interest --

17 THE COURT: But your client is not a criminal defendant
18 in this case.

19 MR. WOOD: Your Honor, he's been advised that his --
20 well, he is a criminal defendant in California --

21 THE COURT: Not in this case, he's not.

22 MR. WOOD: In this case he's been advised that his
23 indictment is imminent.

24 THE COURT: In this case before this Court, your client
25 is not a criminal defendant.

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1 MR. WOOD: That's right, Your Honor, but that doesn't
2 mean that he doesn't have Sixth Amendment rights with respect to
3 those cases in which he is a criminal defendant. And his Sixth
4 Amendment right --

5 THE COURT: But this case is an action by the Federal
6 Trade Commission with respect to harm to public consumers. It's
7 not a criminal case.

8 MR. WOOD: Right, Your Honor. But where the asset
9 freeze in this civil case interferes with the Sixth Amendment
10 right to pay counsel of his choice by freezing all existing
11 assets without reference to the alleged fraud or to redressable
12 consumer injury, it's freezing untainted assets and that
13 interferes with the Sixth Amendment right to counsel. Even
14 though he's not a criminal defendant in this proceeding, Your
15 Honor, he does have the right. He is a criminal defendant and
16 that right is being interfered with by a complete existing asset
17 freeze that's not tied to any fraud or --

18 THE COURT: I mean I'm looking at a slew of Fourth
19 Circuit cases that have absolutely rejected this argument,
20 Mr. Wood. I mean I'm looking through -- there's a series of
21 cases the government has cited and there's a series of cases --
22 I'll just look through here in terms of this whole Sixth
23 Amendment issue here with respect to the freezing of assets and
24 start back within the last, you know, almost 20 years ago.
25 There's *Kemp v. Peterson*, 940 F.2d. 110, Fourth Circuit opinion,

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1 as tracing, Your Honor, the cases do say that you don't have to
2 trace every dollar frozen specifically to a dollar of fraud
3 proceeds. But there has to be some correlation between freezing
4 of the amount and the amount of the consumer injury and the point
5 that we've made here is that the consumer injury alleged by the
6 FTC is a fiction. It's a number pulled out of the Canadian
7 filing that has to do with total sales. It's not tied in any way
8 to the fraud and so they haven't made any showing that these are
9 tainted assets that have been frozen. And the cases that you
10 mentioned in the Sixth Amendment right to counsel were found not
11 to trump the assets frozen are all cases and they all say if I'm
12 not mistaken that you don't have a right as a criminal defendant
13 to spend somebody else's money on your criminal defense counsel.
14 And that all turns on whether the assets are somebody else's
15 money. Whether they're tainted, whether that means that there
16 was tracing to fraudulent proceeds or whether that means that as
17 many of those cases are forfeiture cases, the title vest in the
18 government at the time of the alleged misconduct rather than
19 here, where these assets remain Mr. Jain's until there's been
20 some showing that he owes ultimate relief in the case.

21 THE COURT: Is there a constitutional right under the
22 Sixth Amendment to counsel in a civil lawsuit?

23 MR. WOOD: The Sixth Amendment right applies only to
24 criminal counsel, Your Honor.

25 THE COURT: So your argument then is that there's

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1 1991, upholding the district court's preliminary injunction
2 freezing assets to preserve the status quo. And the Fourth
3 Circuit specifically stated that freezing of funds may be proper
4 without respect, without respect to whether these moneys are
5 traceable to the proceeds or profits and income from the
6 proceeds. There is a case in 1988, the Federal Trade Commission
7 World Travel Vacation Brokers. Well, that's not a Fourth Circuit
8 case. There's the SEC, the Securities Exchange Commission v.
9 CHIRP. No. I'm sorry. The Kaplan Drysdale case is a Fourth
10 Circuit case. I mean we have an action by the Federal Trade
11 Commission here alleging massive losses on the part of the public
12 and seeking and alleging that these defendants are part of that
13 process and the claim well exceeds perhaps the assets of these
14 defendants. So it seems to me that the case law is against you
15 and certainly here in the Fourth Circuit, the case law is against
16 you on this.

17 MR. WOOD: Well, there's a couple of points that can be
18 made there, Your Honor. One is that the total injury here
19 exceeds the assets of the defendants and there's been no showing
20 of that. There's been no showing of the amount of assets frozen.
21 There's been no showing of any non-speculative consumer injury
22 figure here other than that pulled from a total corporate sales
23 figure that's not part of the fraud, that's not part of the
24 specific products that may be alleged to have been fraudulent and
25 are not tied to any of the individual defendants. And so as far

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1 been infringement by the freeze of your client's right to
2 criminal counsel in the action in California and in Chicago.

3 MR. WOOD: I think our argument is that there's a Sixth
4 Amendment component to why the asset freeze here is overbroad.
5 But there's also --

6 THE COURT: In the context of the criminal cases in
7 other districts.

8 MR. WOOD: In the context of the criminal case in other
9 districts, Your Honor.

10 THE COURT: There's no Sixth Amendment issue in this
11 litigation because there's no constitutional right to counsel
12 under the Sixth Amendment as to your client. Correct?

13 MR. WOOD: As to fees in this case, yes, that's right.
14 The Sixth Amendment. But Mr. Jain does have criminal counsel in
15 this criminal matter and the total freeze of all existing assets
16 precludes him from compensating his criminal counsel which does
17 implicate his Sixth Amendment right. But, Your Honor, we've also
18 argued that the asset freeze is overbroad, not just based on the
19 Sixth Amendment, but based on this lack of nexus to either fraud
20 or to redressable consumer injury. And so we've argued that the
21 asset freeze is overbroad for two reasons. Sixth Amendment. But
22 also just the FTC's failure to satisfy its burden of showing a
23 need for a complete total existing asset freeze without any sort
24 of a tie to defraud persons. And as a result, all that we've
25 asked for in our motion to modify, Your Honor, is a very simple

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1 nine-word modification and that would be to add the derived from
2 conduct prohibited in paragraph 1 and 2 condition that exists in
3 the P.I. as to acquired assets to the provision freezing existing
4 assets. And that's the only modification that we seek on behalf
5 of Sam Jain.

6 THE COURT: All right. Thank you very much, Mr. Wood.
7 Mr. Webb or Mr. Madigan, I suspect you definitely want to be
8 heard on this one I'm sure.

9 MR. MADIGAN: Yes, Your Honor.

10 THE COURT: All right.

11 MR. MADIGAN: On behalf of Mr. D'Souza, we have a
12 somewhat different argument. Our argument centers upon the fact
13 that it is undisputed that Mr. D'Souza left whatever kind of
14 relationship the FTC wants to claim that he had with the other
15 defendants in December '06. As I mentioned in one of my earlier
16 arguments, the complaint when it details specifics, not
17 broad-based claims of oh, there were millions and millions of
18 dollars of fraud. Specific allegations in the FTC complaint.
19 They all deal with '07 and '08 and I thought that there was
20 agreement and there may be from the FTC. But the language is a
21 little fuzzy which I wanted to clear up. That therefore, that
22 any funds and I'll quote here from the FTC's pleading in response
23 to ours. They say "provided that funds are not tied to the
24 activity prohibited in the temporary restraining order or the
25 preliminary injunction which appears to be the case given Mr.

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1 MS. ROBBINS: 71.

2 MR. MADIGAN: 71 counsel says, Your Honor. I can just
3 paraphrase it if you want.

4 THE COURT: Yes. I've got it. I'm looking at Document
5 86 as the plaintiff's opposition to Mark D'Souza's motion for
6 temporary stay and modification of preliminary injunction is
7 paper number 86 according to what I've got here.

8 MR. MADIGAN: 86. Is that right? I don't know the
9 number.

10 THE COURT: What page are you quoting from?

11 MR. MADIGAN: Page 3 and 4, carrying over to 4.

12 THE COURT: All right. I'm with you.

13 MR. MADIGAN: I'm focused on this two-year absence.

14 THE COURT: Right. I understand.

15 MR. MADIGAN: Okay. And the FTC document says
16 "provided these funds are not tied to the activity prohibited by
17 the temporary restraining order, preliminary injunction which is
18 clear and this is going to be the problem and were obtained after
19 the entry of the preliminary injunction which appears to be the
20 case given D'Souza's departure from I.M.I. in 2006. These funds
21 are exempt from the asset freeze and are available to pay
22 D'Souza's attorney.

23 THE COURT: All right.

24 MR. MADIGAN: Now they add in there it should be the
25 entire period from December 31, '06 to the present because we

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1 D'Souza's --"

2 THE COURT: I am looking at the government's response.
3 Where is this in the government's response?

4 MR. MADIGAN: This is on page 3. At the bottom of page
5 3. I believe was this the reply? I think it's the reply. Let
6 me read the whole thing. "Provided these funds are not tied to
7 the activity prohibited by --"

8 THE COURT: I'm sorry. I'm looking at the plaintiff's
9 opposition to Defendant Sam Jain's motion to modify the
10 preliminary injunction and I'm addressing the section where they
11 say "you should not deny the request to modify the asset freeze
12 because he has failed to demonstrate that it is necessary or
13 appropriate."

14 MR. MADIGAN: This is the response to Mr. D'Souza's
15 motion.

16 THE COURT: Okay. I'm sorry. Okay. I'm having
17 trouble finding where you're reading from, Mr. Madigan. I'm
18 sorry.

19 MR. ARENSON: Your Honor, it's from the FTC's
20 opposition to Marc D'Souza's motion to stay preliminary
21 injunction.

22 THE COURT: Okay. Hold on.

23 MR. MADIGAN: I don't think we have the number though.

24 THE COURT: The opposition to the motion for temporary
25 stay --

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1 had --

2 THE COURT: Do you agree with that, Mr. Arenson and Ms.
3 Robbins? I'm looking at the response you have here and I'm
4 trying to see if there's any issue with Mr. Marc D'Souza on it.
5 Do you agree with that? Do you agree with the representations
6 being made by Mr. Madigan?

7 MR. ARENSON: Your Honor, let me just speak to that
8 briefly. I think the confusion there is the confusion about the
9 asset freeze itself. This actually applies to all the
10 defendants. What the asset freeze says is any money earned after
11 the date of the preliminary injunction forward that is not tied
12 to illegal conduct is theirs to keep and use as they want and the
13 answer to all of these motions is that Mr. Jain and Ms. Ross are
14 free to go seek employment and get a job and pay for their own
15 lawyers. Not use the funds that they stole from consumers to pay
16 their lawyers.

17 THE COURT: But precisely on Mr. Madigan's point that
18 there doesn't appear to be any dispute of Mr. Marc D'Souza's
19 departure from Innovative Marketing in 2006 and so Mr. Madigan's
20 point is as to there's an agreement as to a date certain. After
21 which, you're not seeking to freeze any assets which have been
22 procured after that date. Is that correct?

23 MS. ROBBINS: Well, I think we just need to clarify
24 something though. First of all, up until the end of 2006, I.M.I.
25 had made over \$74 million. So Marc D'Souza is responsible for

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1 the \$74 million. They're jointly and severally liable. So to
 2 the extent that he has assets that are more than \$74 million, up
 3 to \$74 million should be frozen because he is jointly and
 4 severally liable for that amount from the time that he was in
 5 that business and he was in the business until the end of 2006
 6 and the profit and loss statement that was submitted to the Court
 7 from the Canadian pleadings in Exhibit 3, Volume 3, page 213
 8 clearly states that I.M.I. made over \$74 million until the end of
 9 2006. So because the defendants are jointly and severally
 10 liable, he is responsible for that amount of money.

11 THE COURT: All right.

12 MR. MADIGAN: May I say, you know, I've heard about
 13 this Canadian litigation. There is a two-year litigation in
 14 which numerous pleadings were filed with these people suing each
 15 other with regard to who owed what for perfectly legitimate
 16 business, nonlegitimate business. They were not part of a
 17 corporation. They were, the two of them had -- my client had
 18 never even met the other two until '06 and met them one time.
 19 You had -- as Your Honor is going to hear all of this ultimately.
 20 You had these individuals doing all this. And the Court in that
 21 case after receiving the brief, struck the briefs because there
 22 were so many arguments of counsel, the same arguments that Your
 23 Honor routinely instructs the jury is not evidence. Now the fact
 24 that Mr. D'Souza is by their own admission had nothing whatsoever
 25 to do with whatever they want to call the corporation or the

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1 do with it. A piece of paper actually by the people that he was
 2 suing and they were suing him in a fight over money. And to say
 3 that we'll freeze -- why don't you freeze \$200 million and make
 4 sure he could never have a dime to defend himself? No. The law
 5 is that they have to make some showing and with respect to the
 6 two-year period where he wasn't there, it's impossible. They
 7 have to have some showing that he had some involvement in illegal
 8 activities during that period of time.

9 Now in addition to that, I want to draw your attention
 10 to the recent Supreme Court Ashcroft case with respect to that.
 11 That conclusory statement --

12 THE COURT: You're not talking about the Fourth Circuit
 13 Ashcroft case that I cited. There's a recent Ashcroft case.
 14 What is the cite of that case? It's the second time you've
 15 mentioned that. I want to make sure I read that. The recent
 16 Supreme Court case. In fact I have it right here.

17 MR. MADIGAN: We're saying in addition to the period of
 18 '07 and '08, that in addition to that, in order to freeze a man's
 19 assets and prevent him from defending himself in our country, you
 20 have got to make some showing that these assets are taken. You
 21 can't just throw out some number. You have to present some
 22 evidence that there is a connection to taint during this period
 23 of time. And this business, as Your Honor will learn later, the
 24 vast majority of it took place outside of the United States. The
 25 FTC has no jurisdiction outside of the United States. As counsel

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1 activity, in '07 and '08 which just happened to be the periods
 2 that they allege all the activities in the complaint, they cannot
 3 come back and say oh, well, you know, that money is not tainted.
 4 But by the way, since we could hypothetically get him, hold him
 5 to 500 million, let's freeze all 500 million. Let's make sure he
 6 doesn't have a lawyer and he can't defend this case which I
 7 believe Your Honor this is all about.

8 THE COURT: Well, you would agree, Mr. Madigan, that in
 9 the context of this case, there is no Sixth Amendment right to
 10 counsel in this case. It relates to your client's Sixth
 11 Amendment rights in other cases impacted by this case in the
 12 freezing of assets.

13 MR. MADIGAN: Yes. I take the same position as my
 14 co-counsel.

15 THE COURT: But you agree that there's no Sixth
 16 Amendment issue in this case. The context of the Fifth Amendment
 17 issue is in, with respect to the criminal case in Chicago, an
 18 alleged chilling effect on your client's ability to retain
 19 counsel of his choosing because of a freeze order entered in this
 20 case.

21 MR. MADIGAN: Right. My position is that you cannot
 22 freeze -- I mean this is still the United States of America. You
 23 cannot freeze as a government or freeze a man's assets to prevent
 24 him from defending himself based upon a piece of paper that is
 25 filed in a civil proceeding, not by my client, who had nothing to

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1 referred to and a large portion of what we're talking about here
 2 is all outside the United States. They have made no effort
 3 whatsoever in coming in here to show the Court any evidence that
 4 tied specific amounts of moneys to activity in United States.
 5 They can't just throw out a large figure like they continually do
 6 and say well, that's the amount of damage.

7 THE COURT: What assets have been frozen in this case
 8 as to your client thus far?

9 MR. MADIGAN: Marc D'Souza filed the financial
 10 statement that we've been talking about earlier. And the way we
 11 read the order, it freezes the assets up to that period of time.
 12 It's this debate that I was referring to when they try to tie it
 13 to the date of the preliminary injunction and not the two years
 14 earlier when they admit that they have no evidence whatsoever
 15 that Mr. D'Souza had any connection to anybody during that period
 16 of time.

17 THE COURT: Well, I'm trying to clarify, as we speak
 18 right now, what is the status of any freezing of any assets of
 19 your client? What assets of your client have been frozen? Have
 20 any assets been frozen?

21 MR. MADIGAN: Well, I'm not sure that I'm following,
 22 Your Honor. We're subject to the order.

23 THE COURT: Right. And I guess my question is is that
 24 what is the status of his assets? How many accounts are we
 25 talking about?

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1 MR. MADIGAN: Your Honor, I can address that. He did
2 submit some of his assets to the FTC. He had about five or six
3 accounts. I think total amount of money was four or five million
4 dollars in the personal account. So although Marc D'Souza is
5 under an obligation not to spend that money, each of those banks
6 as it is with Sam Jain and Kristy Ross in fact have refused to
7 honor this Court's asset freeze and they are free to walk into
8 those banks at any time and take their money out.

9 THE COURT: These are foreign bank accounts.

10 MR. MADIGAN: They are, Your Honor.

11 MR. RASMUSSEN: We are not taking advantage of that --

12 MR. MADIGAN: And our client is not in the United
13 States, does not live in the United States and never lived in the
14 United States and neither does Maurice, his father, as you will
15 hear. This is not somebody who has fled somewhere. These people
16 conducted these activities outside of the United States. A lot
17 of the transactions were in Bahrain, in Singapore. They were not
18 in the United States and the FTC who only has jurisdiction in the
19 United States has shown the Court nothing with regard to
20 connecting a specific figure that they want frozen to some
21 alleged tainted monetary activity.

22 THE COURT: All right. Thank you, Mr. Madigan.

23 MR. MADIGAN: And we think they do.

24 THE COURT: Thank you, Mr. Madigan. Mr. Webb, will be
25 glad to hear from you.

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1 deny someone their Sixth Amendment right to counsel in a criminal
2 case because all they have to do is the FTC can file a complaint,
3 allege anything they want. They can plead a billion dollars
4 here. All they got to do is put it on paper and everything is
5 frozen and that defendant cannot hire a lawyer at all. Now that
6 cannot be the law in America. In fact what I think the cases
7 say, if there were no parallel criminal proceeding, then the
8 government, the FTC under the case law, some of which you read
9 off, has the right to go out and basically seize assets so that
10 they have a fund to help victims later on. Essentially can do
11 that. Okay. When you bring in a criminal case, you bring in a
12 constitutional right. The Sixth Amendment to counsel. And what
13 the government is saying is even though they understand the Sixth
14 Amendment right to counsel, they don't have to modify their
15 conduct. They can freeze every asset the defendant has, deprive
16 them of right to counsel and it's okay. You just heard Mr.
17 Arenson say, she can wait tables and if she just earns enough
18 money, she can pay me or pay Ms. Derwin who's here in the
19 courtroom who is her criminal counsel. That's not the law, Your
20 Honor. What the law is is that if there's a right to -- if
21 there's a criminal case and therefore, the Sixth Amendment right
22 to counsel comes up, the government has to go forward with some
23 showing that her assets, all of her assets are connected to the
24 wrongdoing. We need to have some kind of evidentiary hearing
25 here. Because without that, if you just deny this motion right

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1 MR. WEBB: Yes. I'm going to be brief.

2 THE COURT: All right.

3 MR. WEBB: I can probably -- but it is a critical
4 issue. Okay. And I'm just not going to minimize. I got Kristy
5 Ross. Just bear with me, Your Honor.

6 THE COURT: Mr. Webb, I don't think I've ever heard of
7 a lawyer in any case involving the bank accounts of their client
8 to have indicated that it was not a critical issue. I think this
9 is probably the most acute issue that lawyers always address in
10 these kinds of matters, both civil and criminal.

11 MR. WEBB: Fair enough. I agree. But I'm going to be
12 concise because you've heard the arguments and you'll make a
13 decision. My point is as follows. Kristy Ross. The freeze
14 order freezes everything she has. Every asset she has as of the
15 date of the P.I., every single asset she has and I told her that
16 she cannot -- that's number one. Number two, she is under
17 criminal investigation and is going to be indicted in Chicago and
18 has lawyers working for her right now, not me. Okay. But she
19 has a Sixth Amendment right to counsel in that criminal case and
20 no one can deny that. That's point two. Point three. I told
21 her she cannot use any assets that she has as of the date of the
22 P.I. to pay her lawyers in the criminal case even though the
23 assets have nothing to do with any wrongdoing. She can't do it.
24 Everything she owns is frozen. I went and looked to see if I
25 could find a case. That means the government has the power to

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1 now and she can't use her assets at all to hire a lawyer in a
2 criminal case, then she is being deprived of her right to counsel
3 and that can't be the law and I don't think it is the law. Thank
4 you.

5 THE COURT: All right. Thank you very much, Mr. Webb.
6 Do you want to be heard on this, Mr. Wood, any further on this?

7 MR. WOOD: Briefly, Your Honor.

8 THE COURT: All right.

9 MR. WOOD: To the Sixth Amendment point, Your Honor,
10 the FTC has sent a notice to Mr. Jain's criminal counsel that the
11 money in their client trust fund for Mr. Jain that has not been
12 spent is frozen and so the Sixth Amendment threat here is very
13 real. It's not speculative at all.

14 THE COURT: All right. Ms. Robbins, I'll be glad to
15 hear from you.

16 (The court reporter conferred with the Court.)

17 THE COURT: All right. Counsel, the Court staff has
18 requested that we take a ten-minute recess. We're going to take
19 a ten-minute recess and then we're going to continue to plow
20 through this. I suspect that we're probably going to go until
21 5:30 or quarter to 6. We'll take a ten-minute recess. We'll try
22 to start as promptly as we can in ten minutes.

23 (Recess.)

24 THE COURT: All right. Ms. Robbins, will be glad to
25 hear from you.

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MR. MADIGAN: Your Honor, I found the slip opinion.

THE COURT: Okay. Yes. Certainly, Mr. Madigan.

Thank you very much.

MR. MADIGAN: Apparently, it's not printed yet. But it's May of this year.

THE COURT: This is the Ashcroft v. Iqbal case?

MR. MADIGAN: Yes.

THE COURT: The May 18, 2009 opinion. Yes. I'm familiar with this. A little bit higher standard under Rule 8A in terms of pleading. Correct? Isn't that essentially what it's saying? I mean as I recall it, it's got to raise a right to relief above the speculative level and the matter of the plausibility standard under Twombly was explained in a little more detail.

MR. MADIGAN: And it specifically talks about conclusory statements like the ones we've found in the FTC complaint being not enough.

THE COURT: Yes.

MR. ARENSON: And for the record, we are going to forcefully address this in our --

THE COURT: Oh, absolutely. Yeah. We're going to address this. Okay. All right. Thank you very much, Mr. Madigan. Go right ahead, Ms. Robbins, if we can on this, the issue of the freezing of accounts.

MS. ROBBINS: Okay. So, Your Honor, I just want to be

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THE COURT: Yes.

MS. ROBBINS: That's absolutely right.

THE COURT: And you would acknowledge that there are Sixth Amendment, that because of what appears to be -- well, apart from whether or not the defendants have been indicted, counsel for the Defendant Jain, the Defendant Ross and the Defendant Marc D'Souza have clearly represented that they've all been advised that their clients are going to be indicted by a federal grand jury in the United States District Court for the Northern District of Illinois and that is the indication they've made. So there is definitely a Sixth Amendment issue the Court has to address here, is there not?

MS. ROBBINS: Your Honor, as the Kaplan case said, the right to counsel of choice belongs only to those with legitimate assets. As of right now --

THE COURT: And does not the matter of the legitimate assets require a factual finding by the Court?

MS. ROBBINS: Well, Your Honor, we have submitted evidence to the Court that the defendants have made in excess of \$74 million. The defendants have submitted no affidavits, no evidence of any kind.

THE COURT: I understand. But my point is is that does this not require some determination of whether or not assets are derived from certain conduct. For example, it may or may not be that the defendants present evidence of an inheritance on the

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clear that in the P.I., the asset freeze provision does not cover after acquired assets and I just want to make that perfectly clear. Now the Court at the P.I. stage found that the FTC and at the TRO stage found that the FTC was likely to succeed on the merits based on the volumes and volumes of exhibits that the FTC submitted and that this is a restitution case. That there are over one million consumer victims and that gives this Court the authority to freeze the defendants' assets. We know from the profit and loss statement that I referred to earlier in Volume 3, that was prepared by Sam Jain, the company CEO, in a Canadian litigation where they were fighting over the profits from I.M.I. That was the basis of the litigation, was fighting over who gets that money from I.M.I. and in that litigation, the CEO submitted a profit and loss statement that they made over \$74 million. Any number above that, the FTC doesn't know because the defendants have refused to give us any more information.

THE COURT: Well, let me ask you this, Ms. Robbins. The key language in the asset freeze is with respect to assets that are derived resulting from the conduct prohibited in paragraphs 1 and 2. Correct? That's the key phrase, is it not?

MS. ROBBINS: Yes. But I'm also referring to paragraph F --

THE COURT: Yes.

MS. ROBBINS: -- which says that assets acquired after the effective date of this order that are derived. Absolutely.

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part of one of these defendants. It may be that there's a subsequent, a job unrelated to Innovative Marketing, Incorporated. There may or may not be assets. Does not in terms of the importance of this issue does not require some factual finding by me because Mr. Webb has suggested the need for perhaps an evidentiary hearing on this point?

MS. ROBBINS: Well, Your Honor, that's correct. But they have to submit evidence showing that they have the need. They have to submit evidence that they don't have access to non-frozen funds. They have to submit evidence that they don't have a job that they can actually afford to pay their attorneys now. And to be clear, as the Court points out, there is no right to an attorney in a civil case. No constitutional right to an attorney in a civil case and courts frequently deny defendants the asset freeze money to pay for those civil attorneys and in this case, number one --

THE COURT: Well, again, but that's a separate issue. The issue is here, the issue is here before the Court strictly because of the fact that there is a certainty -- when the preliminary injunction was entered in December, there was an indication of some criminal investigation. It wasn't clear to me -- I had no doubt there was a criminal investigation. I had no doubt there would be. And Mr. Arenson I think aptly noted there was reference to a search, execution of a search warrant. But the question is the extent of the criminal investigation.

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1 And now that we know the extent of it and the need to determine
2 whether or not it's derived from unlawful activity or not,
3 there's a Sixth Amendment issue here because of the criminal
4 case. It seems to me that there's some factual findings I need
5 to make and the record is really not complete before me to make
6 those findings.

7 MS. ROBBINS: Absolutely right. The defendants have
8 submitted no evidence that they do not have access to non-frozen
9 funds. They have submitted no evidence that they have not gotten
10 out and gotten a job and can afford to pay their attorneys now.

11 THE COURT: Well, it's bigger than that. It also has
12 to be evidence I have to address in terms of whether frozen funds
13 include other assets or whether these assets are derived from the
14 conduct prohibited in the preliminary injunction.

15 MS. ROBBINS: And those are the very documents, the
16 corporate documents that they have refused to turn over to us.

17 THE COURT: Well, perhaps they'll be more anxious to
18 turn them over now if we have to schedule an evidentiary hearing
19 on this point.

20 MS. ROBBINS: That's correct. And I'd like to just
21 point out as to Marc D'Souza, that he has said on his financials
22 that he is making \$1.2 million a year right now from an exempt
23 business. That is not covered by the asset freeze and he even
24 said in his papers that this is not an issue of monetary need.
25 That he just doesn't want to spend his own money. And he should

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1 THE COURT: Go ahead.

2 MS. ROBBINS: And I'd just like to note that the FTC
3 Act under the safe web amendments allows the FTC to redress
4 foreign victims and also allows the FTC to redress victims in the
5 U.S. caused by foreign entities. And in this case and we've
6 submitted this in one of our pleadings, there was a document that
7 was attached to Defendant Sundin's affidavit that states that 59%
8 of I.M.I. sales was derived from the United States. So --

9 THE COURT: I don't have any about the impact in the
10 United States, Ms. Robbins.

11 MS. ROBBINS: And I would just also like to point out
12 that the I.M.I. as the Court found at the P.I. stage is a common
13 enterprise and part of that common enterprise is based in the
14 U.S. in Ohio and that's ByteHosting.

15 THE COURT: All right. Thank you very much, Ms.
16 Robbins. Will be glad to hear from any counsel in rebuttal on
17 this.

18 MR. WEBB: I'm going to be very brief. I just want to
19 make two quick points because Your Honor just asked counsel two
20 questions which were the right questions. You asked counsel
21 right now to the government would you at least agree with me that
22 there's a Sixth Amendment right to counsel that we have to deal
23 with now because of the criminal case. She didn't answer that
24 question. The answer is yes. I don't see -- that's like saying
25 Red China doesn't exist. Okay. I mean it exists. There's a

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1 not be allowed to spend consumers' money, money that was
2 ill-gotten when he is already making \$1.2 million a year.

3 And, Your Honor, I would just like to point out as the
4 Court did in the Kemp case that the FTC is not required to trace
5 at the preliminary injunction stage and that the very idea that
6 the defendants have not -- we cannot trace because the defendants
7 have deprived us of any documents allowing us to do so. And just
8 to point out in the U.S., we have frozen \$174,000. We don't have
9 any idea how much money that the defendants have because they
10 have not given us any indication and but what we do know is we
11 have in excess of \$74 million in consumer redress.

12 THE COURT: So the sum total of assets frozen in the
13 United States right now is \$174,000.

14 MS. ROBBINS: That's correct.

15 THE COURT: And no compliance by any bank outside of
16 the United States on a freeze order.

17 MS. ROBBINS: That's correct.

18 THE COURT: Okay. Well, thank you very much,
19 Ms. Robbins. Thank you very much. I'll be glad to hear from
20 you, Mr. Madigan --

21 MS. ROBBINS: Oh, and actually, you know what? I'm
22 sorry. I would like to address the foreign --

23 THE COURT: Yes. Go right ahead.

24 MS. ROBBINS: -- victim, foreign consumer because that
25 was raised.

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1 criminal case in Chicago. My client is going to be indicted. My
2 client needs lawyers now --

3 THE COURT: I think you might be dating yourself, Mr.
4 Webb. We don't refer to China anymore as Red China.

5 MR. WEBB: I know. I go back -- I'm old.

6 THE COURT: We refer to Red Korea in light of the last
7 two or three days. I don't think we call China Red China
8 anymore.

9 MR. WEBB: I always wondered why we said it didn't
10 exist when as a kid, I could see it on the map. So it looked
11 like it was there. But that's the first question counsel didn't
12 answer and the answer is obviously yes. The second question is
13 don't you need an evidentiary hearing before you allow the
14 government to freeze all of the assets of Kristy Ross and counsel
15 didn't even answer that question which is the answer is yes.
16 Here's what I heard counsel say and I'd like to focus on this.

17 Counsel said that there's a profit and loss statement that they
18 have showing through 2006 that I.M.I. had total profits of \$74
19 million and the government alleges every penny of that is tainted
20 illegal gotten gains. Okay. But neither counsel say, but we
21 can't prove that unless Kristy Ross gives us the security
22 software or we can't prove that unless we get the corporate
23 documents. I want an evidentiary hearing. I want to know what
24 if -- according to Your Honor and that they filed a P.I. in which
25 they now have a substantial likelihood to succeed on the merits.

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1 I don't think they've even tested the security software to show
 2 that the software doesn't do what it's supposed to do. That's
 3 what I say on information and belief. I could be wrong. We come
 4 to an evidentiary hearing and I could find that I'm wrong and I'd
 5 admit it. But I don't think they have. I don't think they have
 6 the evidence that a fraud has occurred here and yet, they want to
 7 freeze every asset my client has. All I respectfully ask is a
 8 fair evidentiary hearing. I want to know what their evidence is.
 9 Not what they want to get from Kristy Ross. What is their
 10 evidence today that that \$74 million is all ill-gotten gains.
 11 That would be a starting point of a evidentiary hearing to at
 12 least have a factual record to prove that my client, all of her
 13 assets should be frozen and she can't hire a lawyer --

14 THE COURT: Well, I agree with you, Mr. Webb, that we
 15 may need an evidentiary hearing in terms of what assets are to be
 16 frozen, what assets are not. We're not going to have a mini
 17 preliminary examination on the matter of the allegations of the
 18 government. There's nothing I've heard that causes me to change
 19 my view that there is a strong likelihood of success in this
 20 courthouse before this jury and this courtroom and I believe
 21 there's a strong likelihood of success on the part of the
 22 government and so there's nothing that causes me to change my
 23 view having issued the preliminary injunction. But I am
 24 concerned with respect to trying to identify what assets we're
 25 talking about and you've certainly struck a nerve with me with

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1 Mr. Madigan, the Fourth Circuit has rejected that argument. The
 2 Fourth Circuit has specifically said in the context of a
 3 preliminary injunction, freezing assets to preserve the status
 4 quo, the freezing of funds may be proper without respect to
 5 whether these moneys are traceable. But that is in the context
 6 of a pure civil action. It remains to be seen the overlay of the
 7 criminal case in Chicago. There's clear Fourth Circuit authority
 8 that says the Federal Trade Commission can do exactly as it
 9 suggested here to freeze assets to create a fund for injured
 10 members of the public. The problem here is is that it's
 11 overlaying the Sixth Amendment right to counsel in Chicago.

12 MR. MADIGAN: That's right. And I think there's also
 13 they have to make some showing. They can't just pick it out of
 14 the air.

15 THE COURT: Well, I mean you're getting to the mater of
 16 the figure. You're getting to the matter of the figure. But the
 17 point is is that the Fourth Circuit has held that the freezing of
 18 the assets is to preserve the status quo and it may be proper
 19 without respect to whether these moneys are traceable to the
 20 proceeds or profits or income from the proceeds in terms of any
 21 wrongdoing. That's Fourth Circuit law in the civil context.

22 MR. MADIGAN: And I'll sit down, but the last thing I
 23 have to say is to come back. They're doing a complete circle.
 24 The two years where our client, Mr. D'Souza, had nothing
 25 whatsoever to do with this business and yet, under the literal

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1 respect to the matter of now freezing all assets until we try to
 2 allocate some analysis here of what assets we're talking about to
 3 be frozen.

4 MR. WEBB: Fair enough.

5 THE COURT: Mr. Madigan, anything further on this?
 6 Apparently, again in an evidentiary hearing we'll have to
 7 determine assets of your client and also not only that, but in
 8 terms of the effect on present assets that are apparently gained
 9 independent of any activity with Innovative Marketing,
 10 Incorporated and that will have to await a hearing it seems to
 11 me.

12 MR. MADIGAN: Just to echo what Mr. Webb said. The
 13 government is telling you that they throw out this \$74 million
 14 figure that they picked out of one piece of paper filed in a
 15 two-year civil proceeding where people are cross-examined and
 16 affidavits were submitted and now they're saying that they want
 17 our clients to come in and prove up the fraud. That's what
 18 they're saying. They at the evidentiary hearing have the burden
 19 of making some showing, some showing if not prima facie, some
 20 showing to connect the \$74 million figure. Now they've used
 21 about 18 figures. But let's take 74 --

22 THE COURT: Actually, the Fourth Circuit law says that
 23 they do not have to make it traceable to the proceeds of profits.
 24 And I'm going to give everyone an opportunity to address it. The
 25 Fourth Circuit has specifically -- from what I can tell,

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1 reading of the order which we would like modified says not when
 2 he left which is January 1, '07. But at the time of the signing
 3 of the order which is two years later when he couldn't have had
 4 anything to do with it and they admit that he didn't have
 5 anything to do with it. So with that caveat, so to speak, for
 6 our client, that's what we would --

7 THE COURT: All right. Thank you very much,
 8 Mr. Madigan. Anything further you want to add on this, Mr. Wood?

9 MR. WOOD: I don't have anything --

10 THE COURT: All right. Thank you. With respect to
 11 this, the pending motion, paper number 58, as well as a portion
 12 of paper number 71 as well as the oral joinder of the motion by
 13 Mr. Wood on behalf of the defendant, Kristy Ross, here in court,
 14 the Court is going to withhold ruling on that. I'm going to deal
 15 with a scheduling matter in a few moments with counsel on this
 16 because of the need for an evidentiary record and I'll come back
 17 to you all on this.

18 We're in Category 5 of the six categories to be
 19 addressed today. The next category is the motion to dismiss for
 20 failure to join a necessary and indispensable party. There are
 21 three motions here. The motion of Sam Jain to dismiss under
 22 12(b)(7) and (19), paper number 60. The motion of Kristy Ross to
 23 dismiss under 12(b)(7) and 19, paper number 61. And the motion
 24 of Marc D'Souza, paper number 70. The defendants here seek a
 25 complete dismissal of the case and the arguments proceed in two

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1 parts. Basically, first that Innovative Marketing, Incorporated
 2 was never properly served in this case. It seems to me if I find
 3 that Innovative Marketing was served, then the inquiry stops
 4 right there and then second, that Innovative Marketing, Inc. is a
 5 necessary and indispensable party. Just to cut to the core of
 6 this, the government has not disputed that Innovative Marketing,
 7 Incorporated is a necessary and indispensable party. Correct?
 8 The government's position is yes, they are an indispensable
 9 party. You don't dispute that and you're saying they've been
 10 served. Correct?

11 MS. ROBBINS: Absolutely.

12 THE COURT: All right. So the Court doesn't need to
 13 address that. Innovative Marketing, Inc. is a necessary and
 14 indispensable party. And so we don't need to go into the
 15 language that I've previously utilized in a 2007 opinion because
 16 there's no dispute over it. The question becomes the matter of
 17 the service of process of Innovative Marketing, Incorporated.
 18 And the simple question here is the matter of the service. And
 19 essentially, the government's position is that the government
 20 need comply with international law under the Hague Convention
 21 with respect to the service of process by a private process
 22 server and that's permitted. That's essentially the argument of
 23 the government. Correct?

24 MS. ROBBINS: That's permitted under the Hague
 25 Convention.

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1 amended proof of service. It's done so now and so I think the
 2 sole legal issue for determination here is whether that
 3 January 6th service attempt in Belize was effective under Federal
 4 Rule 4F to join I.M.I.'s --

5 THE COURT: Does not Rule 4F of the Federal Rules of
 6 Civil Procedure specifically provide that unless federal law
 7 provides otherwise, an individual other than a minor and
 8 incompetent person or persons whose waiver has been filed may be
 9 served at a place not within any judicial district of the United
 10 States by any internationally agreed means of service that is
 11 reasonably calculated to give notice such as those authorized by
 12 the Hague Convention on the service abroad of judicial and
 13 extrajudicial documents?

14 MR. WOOD: It does, Your Honor. And the record here
 15 confuses more than clarifies the issue of whether Belize is a
 16 party to the Hague Convention. And the FTC after initially
 17 claiming that the Hague Convention did not apply to Belize now
 18 concludes and apparently with the concurrence of the U.S. State
 19 Department that Belize is in fact a party to the convention and
 20 that service was effective under Rule 4F1. However, at the same
 21 time, the FTC concedes that the official Hague Conference
 22 Registry does not list Belize as a contracting state and so
 23 argues alternatively that if the Hague Convention does not apply,
 24 I.M.I. was served in accordance with Belizean law and thus
 25 effectively under Rule 4F2. But to reach that conclusion, the

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1 THE COURT: Yes. So you're not trying to say there's
 2 been compliance with law within the United States under the
 3 federal rules because you can comply with international law in
 4 terms of how you serve a corporation headquartered outside of the
 5 United States.

6 MS. ROBBINS: That's correct. Under 4F because they
 7 are part of an international agreement under the Hague
 8 Convention, we followed the Hague -- there is no reservation.
 9 And serving by a private process server is allowed and that's
 10 what we --

11 THE COURT: All right. Thank you. I'll be glad to
 12 hear from you, Mr. Wood or Mr. Webb or Mr. Madigan. Whoever
 13 wants to go forth on this in terms of the attack of the service
 14 of process on Innovative Marketing, Incorporated.

15 MR. WOOD: Thank you, Your Honor. And I'll be brief.

16 THE COURT: All right.

17 MR. WOOD: As you know the factual basis for this
 18 motion has evolved substantially from its initial filing. The
 19 FTC has effectively conceded that its initial service attempt on
 20 I.M.I. was insufficient through I.M.I.'s attorneys' private
 21 investigator and then re-attempted service a month later down in
 22 Belize through I.M.I.'s registered agents. The FTC didn't inform
 23 the Court or the defendants of this second service attempt and so
 24 that was not addressed in Jain's opening motions. And the FTC
 25 still at the point of Jain's reply brief had refused to file that

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1 FTC had to bury evidence that Belize and the U.S. had agreed that
 2 international service would proceed through the designated
 3 central authority, which is common for states that accede to the
 4 Hague Convention, but object, Your Honor, to Article 10. The FTC
 5 doesn't dispute that the Belizean authorities gave that
 6 instruction or that U.S. authorities received and acknowledged
 7 it. Instead it asserts only that the State Department Office of
 8 Treaty Affairs does not have a record of that instruction. And
 9 based on that, the FTC had the state department remove reference
 10 to the instruction from its website and then discounts that
 11 evidence as now defunct. But directing the state department to
 12 remove the evidence doesn't affect whether Belize gave that
 13 reference instruction in the first instance and it doesn't
 14 alleviate more importantly the sovereignty and comity concern
 15 that require that Rule 4F2 apply only when Rule 4F1 does not.
 16 And so the bottom line, Your Honor, is that the record I think is
 17 sort of hopelessly unclear as to whether I.M.I. has been served
 18 effectively. And though the defendants bear the ultimate burden
 19 on this motion of proving a failure to join a necessary and
 20 indispensable party where service is contested as part of that
 21 motion to dismiss, the FTC actually bears that initial burden of
 22 proving effective service on I.M.I. and with all of the confusion
 23 and directly contradictory and mutually exclusive theories of
 24 service here, I don't think it can be said that the FTC has
 25 carried that burden and so that's --

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1 THE COURT: Thank you, Mr. Wood. Anything further you
2 want to add, Mr. Webb or Mr. Madigan, on this point?

3 MR. WEBB: No.

4 THE COURT: All right. The Court finds that this
5 motion is without merit and will be denied, the motion to dismiss
6 or failure to join a necessary and indispensable party. All
7 counsel, both for the government and defendants agree that
8 Innovative Marketing, Incorporated is a necessary and
9 indispensable party. With respect to the issue of service of
10 process, the Court finds that I.M.I., Innovative Marketing,
11 Incorporated has been properly served in this case. And so paper
12 numbers 60, 61 and 70 will be denied for these reasons. The
13 government has provided sufficient evidence here to note that
14 under Rule 4, there was proper service effectuated in Belize.
15 The Court notes that with respect to the applicability of Rule
16 4F1 of the Federal Rules of Civil Procedure that under the Hague
17 Convention, service of process by private process server was
18 permitted in 1980. The United Kingdom stated in a letter to the
19 prominent bureau of the Hague Conference on private international
20 law that under the Hague Convention, a person may effectuate
21 service directly, i.e., not through a central government
22 authority, but through a competent person other than a judicial
23 officer or official. The evidence before the Court is that
24 Belize adopted this statement in its 1982 letter and I've noted
25 the affidavit submitted by April D. Haines of the state

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1 Circuit cite, but it was --

2 THE COURT: What year is that?

3 MR. RASMUSSEN: That was 2000, Your Honor.

4 THE COURT: All right. Thank you.

5 MR. RASMUSSEN: There is an issue on subject matter
6 jurisdiction. Because it's a relief defendant, you don't always
7 need subject matter jurisdictions. But the court is clear you do
8 need personal jurisdiction. So the issue is then have they
9 alleged personal jurisdiction adequately with or without the
10 Ashcroft higher standard for our allegation. I don't think
11 they've alleged either with or without Ashcroft.

12 There are two ways you can have personal jurisdiction
13 as we all know. One is general jurisdiction which means that the
14 defendant, the relief defendant has to have enough presence in
15 the district from offices or paying taxes or being a registered
16 agent. None of that applies here. And indeed, I would point out
17 in another case that we didn't put in our brief, but I think it's
18 very important. A Fourth Circuit case, 1997, ESAB Group at 126
19 F.3rd 617. That's 126 F.3rd 617, Fourth Circuit, which said
20 that and as I read the Fourth Circuit cases this weekend on
21 personal jurisdiction, the court is quite strict on personal
22 jurisdiction both in terms of general jurisdiction and specific.
23 In fact, surprisingly strict. The ESAB Group is an example. It
24 says that it quotes Moore. It says threshold contacts must be
25 substantial indeed before there can be general jurisdiction. And

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1 department indicating that there have been no subsequent
2 communications from Belize about this issue. The provisions of
3 4F1 apply. There was sufficient service of process based on the
4 record in this case. And so those motions will be denied and
5 there has been effective service of process upon Innovative
6 Marketing, Incorporated. And Innovative Marketing, Incorporated
7 is a necessary and indispensable party and is in this litigation.

8 So the next issue to address though, I think the last
9 motion is a motion to dismiss for lack of personal jurisdiction
10 and that is a motion of the defendant, Maurice D'Souza, the
11 father of the defendant, Marc D'Souza, and Mr. Rasmussen,
12 obviously, we've saved the best until last. So it's nice to have
13 you here and you now get an opportunity to address the Court.

14 MR. RASMUSSEN: Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. RASMUSSEN: Although Maurice D'Souza is only a
17 relief defendant, not alleged to be a wrongdoer himself, there
18 still needs to be personal jurisdiction over him. Although I
19 don't think the FTC has contested the point, I did want to give
20 you one cite to make very clear that we didn't have in our brief,
21 but I think it would be helpful to know. Just have a cite that
22 personal jurisdiction is indeed required for a relief defendant.
23 And that case is CFTC v. IBS, Inc., 113 F.Supp. 2nd 830, which is
24 in the Western District of North Carolina. That was affirmed on
25 other grounds by the Fourth Circuit. I don't have the Fourth

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1 that case, Your Honor, involved a foreign corporation, a New
2 Hampshire corporation formed there with South Carolina. The New
3 Hampshire Corporation had customers in South Carolina and it
4 advertised in South Carolina. But it was a mail order company.
5 So it wasn't actually present in the state except that it had
6 customers there from its mail order and it did advertise. And
7 the Fourth Circuit said that wasn't enough for general
8 jurisdiction. The allegations with respect to Maurice D'Souza
9 are much less than that. As I understand the allegations, they
10 are that he has a bank account in Hawaii, a \$50,000 bank account
11 in Hawaii, a personal bank account. But we know from the
12 American Express case which is the First Circuit case we did cite
13 in our brief, that that's not enough. And that some of the
14 corporations in which he is a shareholder have listed clients in
15 the United States. But that's one step removed from actually
16 having contacts, having customers in the United States which the
17 Fourth Circuit said in ESAB was not enough showing. So I don't
18 think there's enough basis for general jurisdiction.

19 The other way you can get personal jurisdiction, of
20 course, is specific jurisdiction. Even if someone is outside the
21 jurisdiction, if he purposely directs activity into the district,
22 hurt someone in the district, then there can be specific
23 jurisdiction. But the Fourth Circuit recently spoke to this
24 issue as well in another case which we didn't put in our brief,
25 but probably should have and I'll give you the cite for that as

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1 well. That was last March by the Fourth Circuit in Consulting
 2 Engineers, which is 561 F.3d. 273, at 280. And it says a couple
 3 of things that are very interesting in that case. It says, first
 4 of all, that the effects test does not supplant the minimum
 5 contacts analysis, but rather informs it and that there still
 6 must be minimal contacts within the jurisdiction even if you are
 7 directing some activity into the United States. For the purposes
 8 of this case, United States is the relevant jurisdiction because
 9 the FTC has nationwide service of process. But there's no
 10 allegation that Maurice D'Souza directed anything into the United
 11 States and --

12 THE COURT: What about the transfer of \$18 million from
 13 I.M.I. revenues that were transferred to your client allegedly?

14 MR. RASMUSSEN: No allegation that that transfer took
 15 place in the United States and I don't think there can be any
 16 allegation that that happened in the United States because it
 17 didn't. What happened, Your Honor, is that he -- Maurice
 18 D'Souza's business is a merchant account processor. He has other
 19 clients besides his son. But his business, he's in Singapore and
 20 he has relationships with banks in both Bahrain and Singapore in
 21 which he's like an insurance broker in insurance. He puts
 22 together clients with banks. So that if they have credit card
 23 authorizations, he packages them, gives them to the bank. If the
 24 bank is willing to take them, pays a fee to the bank and the bank
 25 puts it into the electronic system it goes through. If it's the

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1 legitimate party and it's just got to be personal jurisdiction.

2 Now it's important here, Your Honor, I mean because
 3 otherwise you say was there a big loophole here. Money just be
 4 sent outside the United States and never recovered. No, because
 5 this issue doesn't come up very often. This is a case, there's
 6 nationwide jurisdiction. So if he had any contacts if the person
 7 who's received the money had any contacts with the United States,
 8 any substantial contact or directed any activity into the United
 9 States or participated in the marketing or even conspired to
 10 participate in the marketing, he's fair game. But --

11 THE COURT: Did your client maintain any bank accounts
 12 in the United States?

13 MR. RASMUSSEN: One account, personal account in
 14 Hawaii, which as the American Express case that we cite in our
 15 brief says is an inadequate basis for both general jurisdiction
 16 and certainly not for specific jurisdiction because it has
 17 nothing to do with the allegations --

18 THE COURT: In connection with his business in the
 19 United States, has he ever before been involved in litigation in
 20 the United States?

21 MR. RASMUSSEN: Never been involved in litigation,
 22 never had an office, never paid taxes. Only been here on
 23 vacations. Never solicited business. He basically helped his
 24 son out by allowing his services to be used to process receipts,
 25 credit card authorizations that his son gives him. Now I mean

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1 Bahrain bank may send it to Citicorp in the United States if it's
 2 a United States customer. If the United States customer gets his
 3 credit card bill, sees it on there. If he objects, then the
 4 Citicorp Bank will say no, it's not valid and send it back and
 5 will pay it. So Maurice D'Souza is not collecting any money in
 6 the United States. All he is doing is offering a service which
 7 many small businesses need, which is compiling the already
 8 authorized credit card receipts and these were receipts from all
 9 across the world. He had no idea what they were from, what
 10 countries they were from. He simply did the brokerage. He
 11 simply arranged and found the banks that were willing to process
 12 the credit card applications, negotiated the terms of that deal
 13 and did it. Now that's passive -- I mean it's not even really
 14 receipt of money. It's providing a service. Much like a lawyer
 15 or other some service provider in Bahrain providing a service to
 16 a company. And yes, he's a relative of Marc D'Souza who is
 17 accused of much more. But, you know, we have that Kirschenbaum
 18 case, Your Honor, in which the government brought a case against
 19 the husband. The husband said well -- and then it tried to go
 20 after the wife because they said the wife had some of the money
 21 and the court said I think it was the Seventh Circuit, it was the
 22 Seventh Circuit said and however, convenient it may be for the
 23 government and however sincere the government might believe that
 24 the money should be forfeited, it's not enough that -- that's not
 25 enough. There's got to be a party and there's got to be a

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1 what difference does that, a lawyer or anyone else who provide
 2 services. Yes, it's the son, but so it was the wife in the
 3 Kirschenbaum case. I mean it's a lot better than the wife in the
 4 Kirschenbaum case. It wasn't that they just gave him the money
 5 and said stick it in your pocket and hide it. He was providing a
 6 legitimate service not just to these guys, but to other people
 7 and Marc D'Souza decided to involve him to provide the service
 8 and there's no allegation that this happened in the United
 9 States. He didn't just transfer anything. No transfer took
 10 place in the United States. No allegation that Maurice D'Souza
 11 knew what these credit card receipts were for or whether the
 12 marketing was fair or not fair. He knows nothing about the
 13 marketing. Yes, it's convenient for the FTC to say, okay well,
 14 maybe he's got the money. But as we know from the Kirschenbaum
 15 case, that isn't quite enough. And then we have the Ashcroft
 16 case coming after the Twombly case where the Supreme Court says
 17 yes. You know, you can't have -- the only allegation we have is
 18 he has money that came from the United States. It doesn't say
 19 where he got the money. It doesn't say how much money, doesn't
 20 even say whether he still has it. And in fact the FTC knows he
 21 still doesn't have it, Your Honor, because he knows that in that
 22 Canadian litigation that was about the money and the money that
 23 he had that belonged to the I.M.I. was transferred to the I.M.I.
 24 and he doesn't even have it. So that makes things even harder
 25 for the FTC to make any allegation that there's any wrongdoing on

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1 his part.

2 THE COURT: So the evidence is is that the money he had
3 was transferred to I.M.I.?

4 MR. RASMUSSEN: Yes. There was a settlement -- all
5 this Canadian case that we've been hearing about was resolved,
6 Your Honor, and a large payment was made. I mean it was made to
7 defendant, I.M.I., and to Mr. Jain. I mean in retrospect, it
8 would be better if that money had been kept where it had been so
9 it could have been salvaged, but that was well before the, well
10 before any of this litigation started.

11 THE COURT: All right. Well, thank you, Mr. Rasmussen.
12 Thank you very much. Mr. Arenson or Ms. Robbins, I'll be glad to
13 hear from you.

14 MR. ARENSEN: Your Honor, just addressing the last
15 point first. The reason the FTC doesn't know about that transfer
16 is that the defendants refused to tell us. We've asked for
17 information relating to that transfer. Defendants again have
18 declined to provide that information. We've asked for the
19 settlement agreement. Defendants have declined to provide us
20 with that information. This is yet another example of the
21 defendants demanding specificity from the FTC, but refusing to
22 provide the very documents that would allow that kind of
23 specificity. But let's talk a little bit bigger picture here.
24 Mr. Rasmussen declared that Mr. Maurice is just an innocent
25 spouse here, the equivalent of innocent spouse. That's simply

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1 to general jurisdiction which we think exists here. But even if
2 it doesn't, specific jurisdiction certainly does. There's no way
3 that D'Souza can argue he hasn't directed his action at U.S.
4 consumers. It is the U.S. consumers' money who is making its way
5 into his bank accounts and again we have submitted a remarkable
6 amount of evidence considering we have not had any opportunity to
7 conduct any discovery whatsoever and --

8 THE COURT: What discovery would you want, Mr. Arenson?

9 MR. ARENSEN: Your Honor, if we could depose
10 Mr. D'Souza and ask him about his jurisdictional conducts and we
11 have cited a case, Taylor v. Bridgestone, which basically says
12 that unless this is a frivolous claim for jurisdiction, then
13 discovery should be granted. Now we would make the case that
14 discovery isn't even necessary here because we've submitted so
15 much evidence already from these Canadian pleadings of the
16 extensive contacts between Maurice D'Souza and the United States.
17 Again, the defendants, Innovative Marketing, their accounting
18 department had access to Maurice D'Souza's bank accounts, Your
19 Honor. He refers to Innovative Marketing as one of his associate
20 companies. You know, I can't think of much more evidence
21 especially at this stage of the proceeding and it's important to
22 remember that at this stage absent an evidentiary hearing, all
23 the FTC need do is make a prima facie case. We've certainly done
24 that with the evidence we've submitted with the Canadian
25 pleadings and if the Court would like to hear additional

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1 not the case and I think even Mr. Rasmussen would agree with
2 that. In the Canadian litigation, Maurice D'Souza countersued
3 the defendants here and claimed 25% of their profits on the basis
4 of quantum meruit because he was so critical to the company that
5 he was entitled to 25% of its total income. In his counterclaim,
6 he states that the business became entirely contingent upon him
7 and that it would not have been able to operate without him. Now
8 Mr. Maurice D'Souza is not an innocent spouse who was given some
9 money and then ran. He was a critical part of the operation. In
10 fact we've deemed him the financial mastermind of this
11 organization and let's talk about some of the connections he has
12 with the United States. One, he has two bank accounts, not one
13 as the defendants continue to say and accuse us of
14 misrepresenting. He actually has two bank accounts in the State
15 of Hawaii. He has wholly-owned companies that do extensive
16 business in the United States and we've listed more than 20
17 different transactions with U.S. companies found in the ledgers
18 submitted by Marc D'Souza in the Canadian litigation. Millions
19 of dollars of business that he's done in the United States with
20 U.S. companies. He's agreed on multiple occasions to submit to
21 the jurisdiction of U.S. Courts via contracts. He's directly
22 collected tens of millions of dollars in payments from consumers
23 that were defrauded by this enterprise. Those payments as we
24 showed in our pleadings and the flow chart that was submitted
25 went directly into his bank accounts. Now those all are relevant

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1 evidence, I encourage the Court to grant us jurisdictional
2 discovery and we'll develop much more evidence.

3 THE COURT: All right. Thank you very much.
4 Mr. Rasmussen, I'll be glad to hear from you.

5 MR. RASMUSSEN: Yes.

6 THE COURT: Did your client in Canadian litigation
7 represent that he has 25% ownership of or rights to proceeds of
8 Innovative Marketing?

9 MR. RASMUSSEN: No. What he did say was that he was
10 entitled to be paid for the services that he provided the
11 business and the plaintiffs there were saying you're not entitled
12 to any money because all the work you've done. He said yes to
13 standard fee for processing merchant accounts is 25% or 20%,
14 whatever it was and he made a claim for it and said yes, I've
15 provided the service and I needed to be paid for that service and
16 you can't -- yes, there was some money there that was supposed to
17 be proceeds of that of that and that was money that was given
18 back. But he was entitled to his service for just like a lawyer
19 is entitled to his service when he provides a service. They
20 don't doubt he provided merchant service. They allege he
21 provided merchant services in paragraph 59. There's real
22 services. I mean there's nothing wrong about it and that is the
23 fee they charged. If banks don't like to do this kind of work,
24 he has a good relationship with the bank, it's time consuming.
25 They have to investigate, you know, charge backs and whether

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1 these things are authorized. So it's a real service. That's all
 2 he asked for. And yes, he did say his work was essential to the
 3 company because it sure was. Just like sometimes the lawyer's
 4 work is essential to a company and sometimes like an accountant's
 5 work is essential to a company. Yes. If they don't get their
 6 bills paid, they're going to be out of business. But that's not
 7 the same thing as saying that they are conspiratory. And indeed
 8 the facts sometimes --

9 THE COURT: Well, the issue really is the matter of the
 10 systematic and continuous contacts with the United States.

11 MR. RASMUSSEN: And we can't really gloss over it
 12 because the Fourth Circuit won't allow us to. Indeed I really do
 13 direct your attention to this Consulting Engineers case which is
 14 this March case and involved -- I'll just summarize it very
 15 quickly. It involved a Virginia corporation that was doing
 16 business in India at the suggestion of a Colorado corporation
 17 that decided to involve -- so the Colorado corporation decided
 18 to, the Colorado company was helping the Indian company do
 19 something. It said, well, you're going to need to help this
 20 Virginia company so the Virginia company knows how to do business
 21 with India.

22 THE COURT: Is your client available for a deposition?

23 MR. RASMUSSEN: Yes. I'd say he is available for
 24 deposition. The issue is where. And he lives in Singapore. He
 25 is not in good health. He's had an automobile accident. So the

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1 contacts --

2 MR. RASMUSSEN: But they didn't allege it in the
 3 complaint.

4 THE COURT: I understand that. The point is that
 5 they're essentially contending that he, you know, dealt with bank
 6 accounts in the United States, that he actively is involved in --

7 MR. RASMUSSEN: Yeah. But you saw that chart. I
 8 direct your attention to that little table I made. One thing
 9 that was good about this trial is I made a table where I put
 10 every one of their allegations in and I quoted from what they
 11 were citing. So yes. Two accounts, linked accounts in the bank
 12 of Hawaii. Is that really worth fighting over? So, you know,
 13 you have a checking account and you have a line of credit. You
 14 can do two things on your account. The bottom line is \$50,000 is
 15 his personal account in Hawaii. There's no dispute he has never
 16 conducted business in the United States. He's been here maybe
 17 twice for travel a long time ago. He has a business. They don't
 18 dispute he has a business, a legitimate business outside of the
 19 United States. They don't dispute that Marc D'Souza took
 20 advantage of it. Just like if my father had a business and I
 21 could give him some referral, I would refer it to him. And it's
 22 something to say that he's the mastermind because what he did was
 23 important because he asked for a fee for it when somebody tries
 24 to get all his money. They froze his money in Canada. His money
 25 was, all his accounts were frozen and he said well, wait a

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1 issue is as you know from our protective order has been where.
 2 And we think that because certainly he's not a party, they should
 3 go and depose him where he is.

4 THE COURT: Well, we can do it by videotape deposition,
 5 could we not, Mr. Arenson?

6 MR. RASMUSSEN: We could.

7 MR. ARENSEN: We have no objection to that, Your Honor.
 8 Our one concern is that the Court mentioned we'd like to be on
 9 call and I believe Singapore is exactly the opposite of the
 10 United States. So it would be a 12-hour difference and Your
 11 Honor would be asleep.

12 THE COURT: Well, my staff would indicate that given my
 13 schedule, that really shouldn't be a problem sometimes.

14 (Laughter.)

15 MR. RASMUSSEN: Your Honor, one additional point on
 16 that --

17 THE COURT: I'm sorry. Go ahead, Mr. Rasmussen.
 18 Anything further?

19 MR. RASMUSSEN: Your Honor, I think that procedurally
 20 the discovery at this stage would be limited to whether he has
 21 sufficient contacts.

22 THE COURT: Yes. Because I'll tell you the reason I'm
 23 having difficulty with this is that you're indicating that he has
 24 literally none and the government is representing that he clearly
 25 is an active international business person who has extensive

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1 minute, I'm entitled to my fee. And they said well, where is
 2 your contract? He said well, I don't have a contract. I
 3 provided valuable services to a quantum meruit. And maybe 25% is
 4 too high, but --

5 THE COURT: All right. Thank you, Mr. Rasmussen. It
 6 seems to me, Mr. Arenson, that just as I've accorded a window
 7 here as to an evidentiary hearing that was urged by Mr. Webb with
 8 respect to the matter of the issue of the freezing of assets, it
 9 seems to me that the government is also entitled to a window here
 10 with respect to the matter of jurisdiction over Maurice D'Souza
 11 and you're prepared to do a videotaped deposition of that. Is
 12 that correct?

13 MR. RASMUSSEN: That's correct, Your Honor.

14 THE COURT: All right. Okay. I'm going to withhold
 15 ruling on this motion to dismiss for lack of personal
 16 jurisdiction, paper number 90 filed by the defendant, Maurice
 17 D'Souza, to accord the government an opportunity to conduct
 18 jurisdictional discovery on this matter and that jurisdictional
 19 discovery quite simply will be the deposition of Mr. Maurice
 20 D'Souza and I'll leave it to Mr. Rasmussen and to Mr. Arenson and
 21 Ms. Robbins to coordinate the taking of that deposition. Let me
 22 give you a timeframe reference here. I've been looking at my and
 23 I'll withhold ruling on this until, you know, this order will be
 24 pending. I think as I go through the checklist that I have ruled
 25 on all motions that we had before me here with the exception of

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1 paper number 58, the motion of Sam Jain to modify the preliminary
 2 injunction, paper number 71, a portion of that motion filed by
 3 Mr. Madigan on behalf of Marc D'Souza with respect to the issue
 4 as to the freezing of assets and a modification of the
 5 preliminary injunction and then the oral motion of Mr. Webb
 6 joining in that motion. And then paper number 90, the motion to
 7 dismiss by Mr. Maurice D'Souza. So I think that but for paper
 8 numbers 58, 71 and 90, Madam Clerk, I've ruled on all the other
 9 motions here. What I'm going to suggest here, counsel, is I've
 10 been looking at my calendar here and there is one week in terms
 11 of my schedule which is open and then I've really got some
 12 scheduling problems. But I'm going to ask everyone if you would
 13 look at your calendars for the week of Monday, July the 6th.
 14 I'll hear from everyone before I hear from Mr. Madigan because
 15 Mr. Madigan is recently remarried and so he's under a short lease
 16 here in terms of his schedule. It's a very sensitive matter for
 17 him. As to the others who have been married as long as I have,
 18 you know, maybe we can just do some modification. But I know Mr.
 19 Madigan has a difficult time having any modification in his
 20 personal life because of his recent nuptials within the last two
 21 years. So Mr. Arenson and Ms. Robbins, are you available the
 22 week of Monday, July the 6th, specifically either Tuesday the 7th
 23 or Wednesday the 8th to continue this hearing on these, just the
 24 matter of the still pending motion to modify the preliminary
 25 injunction and the matter of the asset, freezing of assets?

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1 bringing the jury back on the 6th and that trial is going to
 2 clearly run at least through that week. That's what he expects
 3 and that's what we expect. I normally would never like my
 4 schedule to interfere with anything else. I have a partner named
 5 Tom Kirsch who's working on this case with me. But he happens to
 6 be my -- I have him on that other case, too, just by coincidence
 7 and so both of us are on trial in front of --

8 THE COURT: Both of you are in trial, not on trial.

9 MR. WEBB: That's a very important distinction. We are
 10 in trial and now like every major case, sometimes things fold at
 11 the end as Your Honor knows better than anybody. If there's any
 12 chance that my case doesn't go to trial, I would be here. Okay.
 13 And --

14 THE COURT: Well, could you not have someone else from
 15 your firm address this issue if we go for Wednesday morning,
 16 July the 8th, Mr. Webb, because we're really just getting to the
 17 matter of linking of assets and the matter of whether or not
 18 there's evidence as to Kristy Ross' assets being in any way
 19 related to the drive, as the result of ill-gotten gains?

20 MR. WEBB: I'll do everything I can, Your Honor.

21 THE COURT: It's a fairly narrow issue here. It's
 22 going to take about two hours at most and it just seems to me
 23 that that's really the only window I have looking at my calendar.

24 MR. WEBB: Your Honor, I'll have to find somebody else.

25 THE COURT: I mean I apologize to you. How about you,

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1 MR. ARENSEN: We are, Your Honor. Tuesday will be
 2 slightly better for us.

3 THE COURT: All right. Okay. That's fine. Let's take
 4 a shot at --

5 MR. MADIGAN: If I may, Your Honor, Tuesday falls right
 6 into the problem that Your Honor was describing. Wednesday I
 7 could do it. It would be terrific.

8 THE COURT: You would be available Wednesday, July the
 9 8th. Is that right?

10 MR. MADIGAN: Yes, Your Honor.

11 THE COURT: All right.

12 MR. WEBB: Judge, while you're looking at the time, can
 13 I, just so I can run something off?

14 THE COURT: Sure.

15 MR. WEBB: I'm starting a major jury trial in the
 16 Southern District of New York on June 23rd. We just had a
 17 hearing in front of the judge last week, the trial judge and he's
 18 told us -- we've tried to project out the trial. It's a pretty
 19 big case. That trial clearly, everyone expects it to go about a
 20 week beyond that July 4th weekend. In other words, we're
 21 resuming -- he's going to recess the jury for the Fourth of July
 22 and he's bringing the jury back on the 8th and I think that's the
 23 6th.

24 THE COURT: That's a Monday.

25 MR. WEBB: That's Monday, right, the 6th? So he's

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1 Mr. Wood? Are you available?

2 MR. WOOD: I'm available, Your Honor. I would like to
 3 consult with Mr. Luskin, but one or the other of us --

4 THE COURT: Okay. And Mr. Rasmussen, I'm inclined to
 5 also schedule the matter of your pending motion to dismiss for
 6 lack of personal jurisdiction on that day and make sure that the
 7 deposition of your client would be taken sometime prior to
 8 Wednesday, July the 6th?

9 MR. RASMUSSEN: That would be fine, Your Honor.

10 THE COURT: Okay. All right. So we're going to
 11 schedule this in for 10:00 Wednesday morning, July the 6th to
 12 continue this hearing. I don't think it would take more than --

13 MR. MADIGAN: The 8th you meant, Your Honor.

14 THE COURT: It's Wednesday, July the 8th. Yes.
 15 Wednesday, July the 8th. I'm sorry. And I don't think it would
 16 take -- I've got a hearing that afternoon. But I would certainly
 17 think that we would anticipate this would take no more than two
 18 hours. It will be from 10 to 12. Mr. Webb, I don't want to foul
 19 up the court up there in the Southern District of New York.

20 Depending upon how long this case is going to go, maybe, you
 21 know, if you wanted to come down here the night before and hop on
 22 the train on the Acela and go back up for an afternoon session of
 23 the court. It's about a two-hour run on the train. I apologize
 24 to you. But if one of your partners is not able to do it as
 25 well --

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MR. WEBB: We'll figure it out, Your Honor.

THE COURT: All right. And I do apologize to you. I think it's important to pick up on it. I'm not prepared to rule on it. I think it's important for your clients to be able to address this issue on the matter of these gains.

Now as to submissions, it would be very helpful to the Court. I'm certainly prepared to take testimony on Wednesday, July the 8th if you believe it's necessary, if you proffer exactly what evidence you want to present or what testimony you want to present and you can certainly do so in terms of attachments for supplemental briefing. Both sides can brief this and engage in supplemental briefing. My view is that both sides can supplement their briefs on this question. If you can do it by -- the problem is I'm going to be out for about a week and a half and then arriving back here on Monday the 6th. If everyone can brief this question by Wednesday, June the 24th. Actually, I'm going to ask you if you'll do it in the next two weeks, by Tuesday, June the 23rd so that I can take some light reading with me when I'm out of the courthouse in terms of any supplemental briefing when I leave the courthouse that next day. So if you just, any supplemental briefing you want to, you know, engage in on this, just get your briefs in by Tuesday, June the 23rd. I don't think they need to be particularly exhaustive. It seems to me that we can observe some kind of reasonable page limitation here in that increasingly I'm finding that we're

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alleged damage and the extent of damage to the public. I have to look at trying to trace that these are traceable to ill-gotten gains as counsel for the defendants have noted because there's a higher standard I have to apply here because of this Sixth Amendment overlay in this case. So --

MR. ARENSON: And, Your Honor, the defendants will be appearing at that hearing and the government will have a chance to cross-examine them on their affidavit?

THE COURT: Well, we'll have to wait and see. I don't know if that's what they're going to do in terms of submission. Yes. It certainly seems to me -- that's a very good question, Mr. Arenson. It certainly seems to me that we should be able to within the parameters of their Fifth Amendment privilege, to the extent Mr. Madigan and Mr. Marc D'Souza or Mr. Webb and Ms. Kristy Ross wants to represent the status of their accounts and the source of funding for their accounts, that will be very helpful and I don't think we can just do that by an affidavit. You're going to have to just think through this. I'm not sure what the answer is right now. But I'm not going to permit a deposition of your clients. But for example, if Kristy Ross says I inherited \$3 million from my grandmother, here's the will and the account and the transfer of money, that's a perfectly valid thing to present to me in terms of then permitting the government to seize those accounts. I don't think that will be appropriate and I'm not going to permit the government to seize an account

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looking at cases measured by the pound it seems in terms of a submission. Is there any reason to have more than ten pages submitted on this from the point of view of the government?

MS. ROBBINS: No.

MR. ARENSON: No, Your Honor.

THE COURT: Counsel for the defendants, you can zero in on this in about ten pages, wouldn't you think, Mr. Madigan?

MR. MADIGAN: Yes, Your Honor.

THE COURT: You can attach whatever days you want. To the extent if you think it's necessary to present any evidence, you indicate to me if you've got a witness you want to call. I'm just trying to focus on the matter of the financial situation, the accounts that are in question, evidence with respect to whether or not they're traceable to allegedly ill-gotten gains or not. To the extent that the defendants can show that some of these funds are just as a result of other sources of money, that's educational. Just so the government understands, the reason for it is that ordinarily in a civil case with a Federal Trade Commission case, the cases you're citing are very much on point with respect to the fact that you're looking to have a fund of money for a potential recovery for victims of the public. The problem here is that we have a Sixth Amendment overlay on this because of a criminal case that is clearly on the same facts here and I'm satisfied that there is a criminal investigation. So I'm not just bound by the matter of the

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that clearly has funding from another source. So we're going to need to address the matter of how those facts are presented to me, Mr. Webb.

MR. WEBB: Your Honor, that's an issue -- the government is aware of this. I mean Kristy Ross is no longer in the United States.

THE COURT: Right.

MR. WEBB: They may have to seal the indictment of her right now. I don't know. I truly don't know. I have to talk to her, okay, because whether -- well, I have to deal with whether she will -- so I don't want to mislead her. I don't know --

THE COURT: I understand.

MR. WEBB: Just so you understand.

THE COURT: I mean I'm setting a hearing on this to get more evidence before me because I don't feel quite prepared to rule on it today and I think there's some very important issues here and because of it, I'm willing to extend this out until Wednesday, July the 8th to try to see whatever other facts can be presented to me with respect to the factual record here.

MR. WEBB: I understand.

THE COURT: Yeah. That's where I'm going on it. So we'll have to wait and see. Yes, Mr. Arenson?

MR. ARENSON: Your Honor, I just want to point out that it wouldn't exactly be fair to the commission for them to offer up affidavits that were uncross-examined.

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1 THE COURT: Well, it may go to the weight, not the
2 admissibility on that, Mr. Arenson. I may say fine, you've
3 submitted the evidence. I'm not satisfied as to that because the
4 government hasn't had a chance to attack it or cross-examine it.
5 So it's going to be up to the defendants to satisfy me in terms
6 of the independent source of funding. That's what I'm really
7 looking for. And to the extent, for example, that a great deal
8 of money has been paid to the defendants by Innovating Marketing,
9 Incorporated over a period of time and that money has gone into
10 bank accounts, that clearly is a source of funds that they would
11 have gained from the -- and I've looked at the complaint. The
12 complaint clearly references conduct going back to 2002 and 2003.
13 So I'm going to need to be able to flesh this out. But just to
14 say this is a personal bank account doesn't really satisfy my
15 inquiry. I've got to have some indication of what the source of
16 the funding is and there may be W-2's, for example, of income
17 from other companies that are unrelated to this and I can get
18 some measure of what money was paid into those individuals from
19 other sources of income. I just don't know. But again, that's
20 part of the reason I'm doing this is because I'm devoid of a
21 record here and I think it's a very important issue. Same matter
22 as to Mr. Maurice D'Souza's motion. I think it's important to
23 develop a factual record and I am confident as to the record on
24 those motions on which I ruled today. But these are two areas
25 where I need more record before me.

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1 order at that time. My clerk will make a note to remind me on
2 Wednesday, July the 8th, we will enter a scheduling order. I'm
3 going to wait for now in terms of these other preliminary
4 matters. But we'll have a scheduling order that we'll discuss
5 and in my scheduling orders, I have a letter that's attached to
6 it. In light of the -- I've been doing this for a while anyway
7 and I've received reinforcement on my view of civil discovery
8 from the American College of Trial Lawyers within the last month
9 in terms of the problem with discovery in civil cases. And
10 really the crisis in the legal community that's been created by
11 unnecessary discovery disputes. So as you all may or may not
12 have heard or you'll find out, I just have a very short patience
13 for those. I don't refer discovery disputes to any magistrate
14 judges. We have the leading national expert here, Chief
15 Magistrate Judge Paul Grimm, who's a close friend, a wonderful
16 guy and he has expertise in an area that didn't exist 25 years
17 ago and that's civil discovery. And he's got great expertise in
18 electronic stored information, in ESI. I do acknowledge that
19 there are issues as to ESI that I may, I haven't had to do it
20 yet, but I may have to address to him. But on discovery
21 disputes, nobody in my case has filed any motion of any kind for
22 motion to compel, motion for protective order. When I issue the
23 scheduling order, you'll see there's a standard letter that goes
24 out in my cases that says any lawyers that have any disputes on
25 discovery, the first step is you have to arrange a telephone call

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1 MR. ARENSON: Fair enough, Your Honor. I realize it's
2 getting late. One more question. As to the preliminary
3 injunction and when the defendants will be complying is, the
4 Court going to give additional guidance on that point?

5 THE COURT: The point is is that with respect to my
6 rulings thus far, I'm expressing compliance. The only open
7 issues now are the matter of the freezing of assets and the
8 matter of the personal jurisdiction of Maurice D'Souza. As to
9 Sam Jain, Kristy Ross and Marc D'Souza, they've acknowledged the
10 jurisdiction of this court. The preliminary injunction remains
11 operative. To the extent that there are documents that you're
12 awaiting, you should be getting those documents. To the extent
13 that there's an assertion of a Fifth Amendment privilege as to
14 particular documents, they can assert those on an individual
15 basis as they go. So I'm expecting their counsel to act in good
16 faith on that and I'll expect, we can have a status review on
17 Wednesday, July the 8th in terms of where we are on this matter.
18 That's exactly, that would be exactly a month, essentially four
19 weeks from tomorrow we're going to have another hearing and I
20 expect there to be some discovery going on and I expect some
21 compliance and some documents being turned over within the next
22 four weeks. But I'll leave that to counsel to work out and
23 certainly, if there's any foot dragging on that, I expect to be
24 told and be aware of it by Wednesday, July the 8th. I mean yes,
25 Wednesday, July the 8th and then we can enter into a scheduling

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1 and you call me. And 85 to 90% of the time, all those matters
2 are resolved with me on a telephone call and I've gotten very
3 good feedback from the bar both from the plaintiff's bar and the
4 defense bar about how that works. So we don't get bogged down in
5 a lot of filing of motions and discovery disputes and stays of
6 the scheduling order and I make myself available and not often,
7 but on occasion, I've made myself available for a dispute at a
8 deposition table and it seems to work. And one of the reports
9 I'll tell you from the American College of Trial Lawyers I guess
10 about six weeks ago was that along with all the other problems
11 with the bar, they've also I think appropriately noted that
12 judges need to put their fingerprint on a case and hold on to it
13 and rule and the judges are not totally free from blame on this
14 either in terms of not ruling quickly enough on discovery
15 disputes. I make every effort to resolve discovery disputes as
16 fast as possible so cases move along and that will be true in
17 this case as well. So that's how that scheduling order will be
18 implemented. And we'll get a scheduling order and a discovery
19 deadline and get this case to move. So anything further from the
20 point of view of the government?

21 MR. ARENSON: One small point, Your Honor, we have
22 withheld going forward with discovery pending these motions and
23 now that they're resolved, the FTC intends unless Your Honor
24 directs --

25 THE COURT: Go right ahead. In terms of discovery

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requests, I don't see any reason why you can't. Again, to the extent that there are any Fifth Amendment issues, they will have to be very carefully indicated. We'll have to wait and see.

MR. ARENSON: And one other issue, Your Honor, we asked for a repatriation order in our contempt motion. We would ask the Court to re-investigate and reconsider that at the asset freeze hearing.

THE COURT: Well, the whole matter of asset forfeiture, I will look into. That's the whole point. I've ruled as I have. But I'll reconsider. I'm just going to look at the matter of not asset forfeiture, but the freezing of assets pending this litigation. We'll have to wait and see where we are on that.

MR. ARENSON: Thank you, Your Honor.

THE COURT: Okay. Thank you. Anything further from the point of view of the defendant, Marc D'Souza, Mr. Madigan?

MR. MADIGAN: No, sir.

THE COURT: Anything further, Mr. Webb, from the point of view of Kristy Ross?

MR. WEBB: No, Your Honor.

THE COURT: All right. Mr. Wood, on the defendant, Sam Jain, anything further?

MR. WOOD: No. Thank you, Your Honor.

THE COURT: Tell him I'm anxiously awaiting his arrival in my courtroom. I'd like to see him. It would be very helpful to his cause. And Mr. Rasmussen, anything further on behalf of

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the defendant, Maurice D'Souza?

MR. RASMUSSEN: No, Your Honor.

THE COURT: All right. Thank you very much. It was very nice having you all in my courtroom. I will just tell you that it's always the mark of the quality of lawyers when you suddenly see all the summer interns come in to watch legal argument in this case and that's what we had earlier today with all the summer interns who were here. So it's nice to have you all in my courtroom and I'll see you on Wednesday, July the 8th.

MR. ARENSON: Thank you, Your Honor.

MR. MADIGAN: Thank you, Your Honor.

(Proceedings concluded.)

I, LISA K. BANKINS, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Signature of Court Reporter/
Transcriber

Date

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